111-197

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 258.

AZARIAH STEPHENS, PLAINTIFF IN ERROR,

vs.

THE MONONGAHELA NATIONAL BANK OF BROWNSVILLE, PENNSYLVANIA.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

FILED JUNE 27, 1881.

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1 Among the rolls, records, and judicial proceedings had in the Circuit Court of the United States in and for the western district of Pennsylvania, entered at No. 109, May term, 1879, wherein the Monongahela National Bank of Brownsville, Pa., a corporation organized under the laws of the United States and doing business at Brownsville, in the western district of Pennsylvania, is plaintiff, and Azariah Stevens is defendant, may be found the following words and figures, to wit:

Appearance—Docket entries.

THE MONONGAHELA NATIONAL BANK of Brownsville, Pa., a corporation organized under the laws of the United States and doing business within the western district of Pennsylvania, } No. 109.

vs.

AZARIAH STEPHENS.

[On margin:] Knox & Reed. A. A. Purman, P. A. Knox.

Precipe, affidavit of claim, and copy of note sued upon, filed April 2d, 1879.

Same day. Summons in assumpsit issued, returnable first Monday of April, 1879.

1879, April 4. Declaration of plaintiff filed.

1879, April 4. Summons served personally and by copy upon Azariah Stephens.

2 1879, April 9. Upon motion of defendant's attorney and affidavit presented, order granted extending time for filing affidavit of defense in the above case till 24th instant, filed at No. 106 May term, 1879.

1879, April 24. Affidavit of defense filed.

1879, April 26. On motion of plaintiff's attorneys, rule granted on defendant to show cause why judgment should not be entered against him in this case in default of sufficient affidavit of defense, and reasons therefor filed. Same day, copy rule mailed to defendant's attorney at Waynesburg, Pa.; see No. 106, May term, 1879.

1879, April 30. Receipt for costs filed.

1879, May 1. Rule to show cause returned, service accepted by defendant's attorney.

1879, May 27. Notice of hearing of rule to show cause filed.

1879, May 27. Supplemental affidavit of defense filed.

1879, May 27. Argument had upon rule for judgment in default of sufficient affidavit of defense, and same made absolute.

1879, May 27. Upon precipe filed, and in pursuance of the order of court, judgment is hereby entered in favor of plaintiff and against defendant for the sum of thirteen thousand and four hundred fifty-eight and 10-100 ($13,458.10) dollars. H. D Gamble, clerk.

3 1881, May 18. Petition praying for the allowance of writ of error herein filed, and writ of error commanding the return

of the record and proceedings in the above cause, together with the said writ, to the Supreme Court of the United States, on the second Monday of October next, at Washington, D. C., allowed by the circuit judge and citation signed, returnable on a like day with the writ of error, both of which are filed.

4 *Precipe for Summons and Affidavit of Claim.*

Circuit Court of the United States in and for the western district of Pennsylvania.

THE MONONGAHELA NATIONAL BANK of Brownsville, Pa., a corporation organized under the laws of the United States and doing business at Brownsville, in the western district of Pa., *vs.* AZARIAH STEVENS. } No. , May term, 1879.

To H. D. GAMBLE, esq., clerk:

Issue summons in assumpsit, returnable next return day.

KNOX & REED,
Feb'y, 1879. *Pl'ff's Att'ys.*

WESTERN DISTRICT OF PENNA., *ss.*

Before the subscriber personally came P. C. Knox, attorney for and agent in this behalf of the plaintiff, who, being by me duly sworn according to law, deposes and says:

1st. That the plaintiff, the Monongahela National Bank, is a corporation or association duly organized and incorporated under and by virtue of the act of Congress of June 3rd, 1864, now title LXII of the Revised Statutes of the United States relating to national banks; that said association was so organized in the year 1865;
5 that it is located at Brownsville, within the western district and commonwealth of Pennsylvania, where it has been carrying on business since the date of its organization aforesaid.

2d. That by virtue of the act of Congress aforesaid plaintiff was empowered through its board of directors or duly authorized officers or agents to exercise all powers incidental and necessary to carry on the business of banking, including, *inter alia*, the powers of discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of indebtedness—of loaning money on personal security, &c.

3rd. That under the provisions of said act of Congress, plaintiff was empowered to take, receive, reserve and charge on loans and discounts made, and upon notes, bills of exchange, and other evidences of debt, interest at the rate allowed by the laws of the state where it is located; also where, by the laws of any state, a different rate is limited for banks of issue organized under state laws, the rate so lim-

ited is allowed for associations organized or existing in such state, under title LXII of the Revised Statutes. That plaintiff, being an association organized and existing in the state of Pennsylvania under title LXII of the Revised Statutes of the United States, was at the dates and times hereinafter mentioned, to wit, at the time the original of the note embraced in this suit was discounted, and now is allowed to charge a rate of interest equal to the rate limited or allowed by the laws of Pennsylvania for a bank or banks of issue organized under the laws of said commonwealth.

4th. That under the laws of the state of Pennsylvania there are now organized and have been organized from and since the dates of their respective charters (true copies of which are annexed to and made part of this affidavit of claim), certain banks of issue, permitted by said laws to charge and receive such rates of interest as may be agreed upon by the parties; that said banks have been carrying on business in the state of Pennsylvania since the date of their organization, and are now carrying on business in said state under the provisions of said laws.

5th. That the names of said banks and the titles of the acts of assembly of the state of Pennsylvania creating them, with the dates of the approvals of said acts, are as follows, to wit:

An act entitled "An act to incorporate the People's Bank of Philadelphia," approved February 25, A. D. 1870.

An act entitled "An act to incorporate the United States Banking Company," approved June 2nd, A. D. 1871.

An act entitled "An act to incorporate the Butchers' and Drovers' Bank," approved April 27th, 1870; an act entitled "An act to incorporate the Franklin Bank of the city of Philadelphia," approved the first day of April, anno Domini 1870. True copies of each of said acts of assembly, marked respectively "A," "B," "C," and "D," are annexed to this affidavit and made a part of it.

6. That the said defendant, Azariah Stephens, is indebted to the plaintiff in the sum of ten thousand five hundred and seventy-five dollars ($10,575), with interest thereon from the 7th day of November, A. D. 1874, and in the further sum of one dollar and eighty-five cents ($1.85) protest fees as the endorser of and upon a certain promissory note, a true copy of which is annexed to and made a part hereof; that said note was discounted by plaintiff, became its property before maturity for value in the regular course of its business; that upon the maturity thereof it was presented and demand made for its payment at the Monongahela National Bank of Brownsville, the place where the same was made payable, when payment was refused, whereupon the same was duly protested and notice of demand and refusal as aforesaid was duly given the defendant; that said note is now due and unpaid, with interest as aforesaid.

7. That the rate of interest charged by the plaintiff upon the loan represented by the note aforesaid was at the rate of not to exceed nine per centum per annum, and was the rate agreed upon by

and between it, the plaintiff, and the borrower at the time the loan by the plaintiff to the borrower was originally effected, as well as at the time of each renewal of the note representing said loan through a series of renewals of which the note in suit is the last.

8 P. C. KNOX.

Sworn and subscribed before me this 2nd of April, 1879.

H. D. GAMBLE.
Clerk U. S. Ct. Ct.

$10,575. *Copy of Note.*

OCTOBER 10TH, 1874.

Twenty-five days after date I promise to pay to the order of R. S. Long ten thousand five hundred and seventy-five dollars, at the Monongahela National Bank of Brownsville, without defalcation, for value received.

BARZILLA STEPHENS.

(Indorsed:) R. S. Long, Barzilla Stephens, Az. Stephens.

9 No. 676.—AN ACT to incorporate the Franklin Bank of the city of Philadelphia.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the commonwealth of Pennsylvania, in general assembly met, and it is hereby enacted by the authority of the same,* That R. D. Barclay, J. P. Green, S. S. Moon and James M. Sellers and their associates and successors shall be and they are hereby created a body politic and corporate, by the name and style of the Franklin Bank of Philadelphia, to be located in the city of Philadelphia, and by that name shall have perpetual succession, and may sue and be sued, plead and be impleaded in any court whatsoever; may have a common seal; may renew or alter the same; also, may have the right to own and hold real estate, and improve or dispose of the same at pleasure.

SECTION 2. The capital stock of said bank shall consist of five thousand shares of the value of one hundred dollars each, with the privilege of increasing the same from time to time by a vote of the directors to an amount not exceeding ten thousand shares of like value per share; and when the capital stock is so increased, the stockholders shall have the right to take the shares authorized

10 by such increase, at such price as the board of directors may name: *Provided*, That if such shares of new stock are not taken by the stockholders within ten days after receiving notice of such increase, then the board of directors may dispose of such shares of such stock in such manner as they may deem best.

SECTION 3. The corporators or a majority of them shall have power to open books for subscription to the capital stock at such times and places as they may deem expedient, and when one thousand shares or more of said stock shall have been subscribed, and ten per centum thereon of the same paid in, the stockholders may elect a president

and six directors to serve until the next annual election or until their successors shall have been duly elected and qualified; vacancies arising from death, resignation, or inability to serve, to be filled by the board.

SECTION 4. The said bank shall have power to borrow or lend money for such periods as the said bank may think proper; may discount any bill of exchange, foreign or domestic, promissory note or other negotiable paper, and the interest may be received in advance at such rates as may be agreed upon by the parties; and shall have the right to hold in trust, or as collateral security for loans or advances or discounts, estate, real, personal, or mixed,
11 including the notes, bonds, obligations, or accounts of the United States, individuals, or corporations, and to purchase, collect, and adjust the same, and to dispose thereof for the benefit of the said bank, or for the payment of the debts as security for which the same may be held in any market of the world, without proceedings in law or equity, and for such price and such terms as may be agreed upon by the said corporation and the parties contracting therewith.

SECTION 5. The board of directors shall make all by-laws necessary for conducting the business of the bank, not inconsistent with the laws of the state or United States, and shall have power to require payments for any amount remaining unpaid on the stock of said bank at such times and in such proportions as they think proper, and after thirty days' notice, under penalty, in case of nonpayment as required, of forfeiture to the bank of such stock and all previous payments thereon.

SECTION 6. The said bank may receive money to keep for its depositors, either with or without interest payable thereon, and may buy or sell bullion, buy, sell, draw, or negotiate bills of exchange, bills of lading, stocks and bonds of all companies, states, and of the United States, or other good and sufficient securities, at such rates of interest as may be agreed upon by said bank and the borrowers.
12 SECTION 7. That it shall be lawful for said bank to transact financial business as a natural person, and as such to become and act as a treasurer and financial agent of charitable and religious institutions and corporations, and as financial agent of the state of Pennsylvania and other states, of city governments, and counties and districts, in the management of their business, and shall give security to such institutions, states, and governments for the faithful performance of the duties, if required.

SECTION 8. The board of directors shall have power to declare and pay dividends out of the earnings of the bank to the stockholders, at such times and in such amounts as to them may seem proper.

SECTION 9. The annual election for president and directors shall be on the second Tuesday of January of each year, unless changed by the by-laws of the bank; the directors shall have power to elect all officers or agents they may deem necessary for conducting the business of the bank, except president. Stockholders shall be enti

tled to one vote for each share of stock, and may vote in per-
13 son or by a written proxy, but said proxy must be dated within
six months of and five days prior to the election for which such proxy was given; five days' notice by publication, in one or more of the city papers, shall be given of the time and place where such election will be held, and said election shall be conducted according to the by-laws.

SECTION 10. That the said corporation shall pay into the treasury of the commonwealth such bonus and taxes as are now or may hereafter be required by law; and this charter shall continue for twenty years.

BUTLER B. STRANG,
Speaker of the House of Representatives.
CHARLES H. STINSON,
Speaker of the Senate.

Approved the first day of April, anno Domini one thousand eight hundred and seventy.

JNO. W. GEARY.

14 No. 1396.—AN ACT to incorporate the Butchers' and Drovers' Bank, to be located at Philadelphia.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the commonwealth of Pennsylvania in general assembly met, and it is hereby enacted by the authority of the same*, That Samuel Yerkes, Stephen A. Winslow, William M. Taylor, James Gregory, R. S. League, J. M. Harding, George W. Hutchinson, George W. Painter, Robert Loughlin, Peter A. Widener, J. M. Rogers, their assigns, associates, and successors, shall be, and they are hereby, created a body politic and corporate, by the name and style of the Butchers' and Drovers' Bank, to be located in the city of Philadelphia, and by that name shall have perpetual succession, and may sue and be sued, plead and be impleaded, in any court whatsoever; may have a common seal; may renew or alter the same; also may have the right to own and hold real estate, and improve or dispose of the same at pleasure.

SECTION 2. The capital stock of said bank shall consist of twenty-five hundred shares, of the value of one hundred dollars each, with the privilege of increasing the same, by a vote of the directors, of
ten thousand shares of like value per share; and when the
15 capital stock is so increased the stockholders shall have the
right to take the shares authorized by such increase, at such price as the board of directors may name: *Provided*, That if such shares of new stock are not taken by the stockholders within ten days after receiving notice of such increase, then the board of directors may dispose of such shares of stock in such manner as they may deem best.

SECTION 3. The corporators, or a majority of them, shall have power to open books for subscription to the capital stock at such

times and places as they may deem expedient, and when one thousand shares or more of said stock shall have been subscribed, and ten per centum thereon of the same paid in, the shareholders may elect a president and five directors to serve until the next annual election, or until their successors shall have been duly elected and qualified; vacancies arising from death, resignation, or inability to serve, to be filled by the board.

SECTION 4. The said bank shall have power and may borrow or lend money for such periods as the said bank may think proper, may discount any bill of exchange, foreign or domestic, promissory note, or other negotiable paper, and the interest may be received in advance, and shall have the right to hold in trust, or as collat-
16 eral security for loans or advances or discounts, estate, real, personal or mixed, including the notes, bonds, obligations or accounts of the United States, individuals or corporations, and to purchase, collect and adjust the same, and to dispose thereof for the benefit of the said bank, or for the payment of the debts as security for which the same may be held in any market of the world, without proceedings in law or equity, and for such price and such terms as may be agreed upon by the said corporation and the parties contracting therewith.

SECTION 5. The board of directors shall make all by-laws necessary for properly conducting the business of the bank, not inconsistent with the laws of the state or United States, and shall have power to require payments of any amount remaining unpaid on the stock of said bank, at such times and in such proportions as they think proper, and after thirty days' notice, under penalty, in case of non-payment as required, of forfeiture to the bank of such stock and all previous payments thereon.

SECTION 6. The said bank may receive money to keep for its depositors, either with or without interest payable thereon, and may buy or sell bullion, buy, sell, draw, or negotiate bills of exchange, bills of lading, stocks and bonds of all companies, states, and
17 of the United States, or other good and sufficient securities at such rates of interest as may be agreed upon by said bank and the borrowers.

SECTION 7. That it shall be lawful for said bank to transact financial business as a natural person, and as such to become and act as a treasurer and financial agent of charitable and religious institutions and corporations, and as financial agent of the state of Pennsylvania and other states, of city governments, and counties and districts, in the management of their business, and shall give security to such institutions, states and governments for the faithful performance of the duties if required.

SECTION 8. The board of directors shall have power to declare and pay dividends out of the earnings of the bank to the stockholders at such times and in such amounts as to them may seem proper.

SECTION 9. The annual election for president and directors shall be on the first Monday of June of each year, unless changed by the by-

laws of the bank; the directors shall have power to elect all officers or agents as they may deem necessary for conducting the business of the bank, except president; stockholders shall be entitled to one vote for each share of stock, and may vote in person or by a written proxy, but said proxy must be dated within six months of and
18 five days prior to the election for which such proxy was given; five days' notice by publication in one or more of the city papers shall be given of the time and place where such election shall be held, and said election shall be conducted according to the by-laws.

SECTION 10. That the said corporation shall pay into the treasury of the commonwealth such bonus and taxes as are now or may hereafter be required by law.

SECTION 11. That the stockholders shall be personally liable to an amount equal to the capital stock in addition thereto, and this charter shall continue for twenty years.

BUTLER B. STRANG,
Speaker of the House of Representatives.
CHARLES H. STINSON,
Speaker of the Senate.

Approved the twenty-seventh day of April, anno Domini one thousand eight hundred and seventy.

JNO. W. GEARY.

19 No. 229.—AN ACT to incorporate the People's Bank of the city of Philadelphia.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the commonwealth of Pennsylvania in general assembly met, and it is hereby enacted by the authority of the same*, That Charles A. Miller, John A. Fowler, Joseph B. Walker, R. D. Barclay, D. B. McGinley, John P. Green, O. P. Morrow, and their associates and successors shall be and they are hereby created a body politic and corporate by the name and style of the People's Bank of Philadelphia, to be located in the city of Philadelphia, and by that name shall have perpetual succession, and may sue and be sued, plead and be impleaded in any court whatsoever; may have a common seal; may renew or later the same; also may have the right to own and hold real estate, and improve or dispose of the same at pleasure.

SECTION 2. The capital stock of said bank shall consist of one thousand shares of the value of one hundred dollars each, with the privilege of increasing the same, by a vote of the directors, to five thousand shares of like value per share, and when the capital stock is so increased the stockholders shall have the right to take the shares authorized by such increase at such price as the board of directors may name: *Provided*, That if such shares of new stock are
20 not taken by the stockholders within ten days after receiving notice of such increase, then the board of directors may dis-

pose of such shares of new stock in such manner as they may deem best.

SECTION 3. The corporators or a majority of them shall have power to open books for subscription to the capital stock, at such times and places as they may deem expedient, and when one thousand shares or more of said stock shall have been subscribed, and ten per centum thereon of the same paid in, the shareholders may elect a president and six directors, to serve until the next annual election or until their successors shall have been duly elected and qualified; vacancies arising from death, resignation, or inability to serve to be filled by the board.

SECTION 4. The said bank shall have power and may borrow or lend money for such periods as the said bank may think proper; may discount any bill of exchange, foreign or domestic, promissory note or other negotiable paper, and the interest may be received in advance; and shall have the right to hold in trust, or as collateral security for loans or advances or discounts, estate, real, personal, or mixed, including the notes, bonds, obligations, or accounts of the United States, states, individuals, or corporations, and to purchase, collect, and adjust the same and to dispose thereof for the benefit of the said bank, or for the payment of the debts as security for
21 which the same may be held in any market of the world, without proceedings in law or equity, and for such price and such terms as may be agreed upon by the said corporation and the parties contracting therewith.

SECTION 5. The board of directors shall make all by-laws necessary for properly conducting the business of the bank, not inconsistent with the laws of the state or United States, and shall have power to require payments of any amount remaining unpaid on the stock of said bank, at such times and in such proportions as they think proper, and after thirty days' notice, under penalty, in case of nonpayment as required, of forfeiture to the bank of such stock and all previous payments thereon.

SECTION 6. The said bank may receive money to keep for its depositors, either with or without interest payable thereon, and may buy or sell bullion, buy, sell, draw, or negotiate bills of exchange, bills of lading, stocks and bonds of all companies, states, and of the United States, or other good and sufficient securities, at such rates of interest as may be agreed upon by said bank and the borrowers.

SECTION 7. That it shall be lawful for said bank to transact financial business as a natural person, and as such to become and act as a treasurer and financial agent of charitable and religious institutions and corporations, and as financial agent of the state of Penn-
22 sylvania and other states, of city governments, and counties and districts, in the management of their business, and shall give security to such institutions, states, and governments for the faithful performanee of the duties, if required.

SECTION 8. The board of directors shall have power to declare and

pay dividends out of the earnings of the bank to the stockholders, at such times and in such amounts as to them may seem proper.

SECTION 9. The annual election for president and directors shall be on the second Tuesday of January of each year, unless changed by the by-laws of the bank; the directors shall have power to elect all officers or agents they may deem necessary for conducting the business of the bank, except president; stockholders shall be entitled to one vote for each share of stock, and may vote in person or by written proxy, but said proxy must be dated within six months of and five days prior to the election for which such proxy was given; five days' notice by publication in one or more of the city papers shall be given of the time and place where such election will be held, and said election shall be conducted according to the by-laws.

SECTION 10. That the said corporation shall pay into the
23 treasury of the commonwealth such bonus and taxes as are now or may hereafter be required by law.

SECTION 11. That the stockholders shall be personally liable to an amount equal to the capital stock in addition thereto; and this charter shall continue for twenty years.

BUTLER B. STRANG,
Speaker of the House of Representatives.
CHARLES H. STINSON,
Speaker of the Senate.

Approved the twenty-seventh day of April, anno Domini one thousand eight hundred and seventy.

JNO. W. GEARY.

24 No. 1054.—AN ACT to incorporate the United States Banking Company, located at Philadelphia.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the commonwealth of Pennsylvania in general assembly met, and it is hereby enacted by the authority of the same,* That John Jordon, William Watson, Edward Watson, D. B. McGinley, W. G. McAllister, W. W. Bell, H. B. Dich, and their assigns, proxys, associates and successors, shall be and they are hereby created a body politic and corporate by the name and style of the United States Banking Company, located at Philadelphia, and by that name shall have perpetual succession, and may sue and be sued, plead and be pleaded in any court soever; may have a common seal; may renew or alter the same; also, may have a right to own and hold real estate, and improve or dispose of the same at pleasure.

SECTION 2. That the capital stock of said bank shall consist of one thousand shares of the value of one hundred dollars each, with the privilege of increasing the same from time to time by a vote of the directors to an amount not exceeding fifty thousand shares of like value per share; and when the capital stock is so increased, the stockholders shall have the right to take the shares authorized by such

increase at such price as the board of directors may name:
25 *Provided*, That if such shares of new stock are not taken by the stockholders within ten days after receiving notice of such increase, then the board of directors may dispose of such shares of such stock in such manner as they may deem best.

SECTION 3. The corporators or a majority of them shall have power to open books for subscription to the capital stock, at such times and places as they may deem expedient, and when one thousand shares or more of said stock shall have been subscribed, and thirty per centum of the same thereon paid in, the shareholders may elect a president and twelve directors to serve until the next annual election or until their successors shall have been duly elected and qualified; vacancies arising from death, resignation or inability to serve, to be filled by the board.

SECTION 4. The said bank shall have power and may borrow or lend money for such periods as the said bank may think proper, may discount any bill of exchange, foreign or domestic, promissory note or other negotiable paper, and the interest may be received in advance, at such rates as may be agreed upon by the parties; and shall have the right to hold in trust, or as collateral security for loans or advances or discounts, estate, real, personal, or mixed, including the notes, bonds, obligations, or accounts of the United States, individuals, or corporations, and to purchase, collect, or adjust
26 the same, and to dispose thereof for the benefit of said bank, or for the payment of the debts as security for which the same may be held in any market of the world, without proceedings in law or equity, and for such price and such terms as may be agreed upon by the said corporation and the parties contracting therewith.

SECTION 5. The board of directors shall make all by-laws necessary for properly conducting the business of the bank, not inconsistent with the laws of the state or United States, and shall have power to require payments of any amount remaining unpaid on the stock of said bank, at such times and in such places as they think proper, and after thirty days' notice, under penalty, in case of nonpayment as required, of forfeiture to the bank of such stock and all previous payments thereto.

SECTION 6. The said bank may receive money to keep for its depositors, either with or without interest payable thereon, and may buy or sell bullion, buy, sell, draw, or negotiate bills of exchange, bills of lading, stocks and bonds of all companies and of the United states, or other good and sufficient securities, at such rates of interest as may be agreed upon by said bank and the borrowers.

SECTION 7. That it shall be lawful for said bank to transact financial business as a natural person, and as such to become and
27 act as a treasurer and financial agent of financial or other institutions and corporations, and as financial agent of the state of Pennsylvania and other states, of city governments, and counties and districts, in the management of their business, and shall give

security to such institutions, states, and governments for the faithful performance of the duties, if required.

SECTION 8. The board of directors shall have power to declare and pay dividends out of the earnings of the bank to the stockholders, at such times and in such amounts as to them may seem proper.

SECTION 9. The general election for president and directors shall be on the second Tuesday of January of each year, unless changed by the by-laws of the bank; the directors shall have power to elect all officers or agents they may deem necessary for conducting the business of the bank, except president; stockholders shall be entitled to one vote for each share of stock and may vote in person or by a written proxy, but said proxy must be dated within six months of and five days prior to the election for which such proxy was given; five days' notice by publication in one or more of the city newspapers shall be given of the time and place where such elections shall be held, and said elections shall be conducted according to the by-laws.

SECTION 10. That the said corporation shall pay into the
28 treasury of the commonwealth such bonus and taxes as are, may now, or may hereafter be required by law; and this charter shall continue for twenty years.

Approved the second day of June, A. D. 1871.

JNO. W. GEARY.

(Endorsed:) No. 109. May term, 1879. Monongahela National Bank *vs.* Azariah Stephens. Precipe. Affidavit of claim and copy of notes. Filed April 2, 1879. Knox & Reed.

29 *Summons.*

UNITED STATES, } *sct.*
Western district of Penn. }

The President of the United States to the marshal of the western district of Pennsylvania, greeting:

We command you that you summon Azariah Stephens, late of your district, if he may be found therein, so that he be and appear before the judges of the Circuit Court of the United States in and for the western district of Pennsylvania, in the third circuit, at a session of the same court to be holden at Pittsburgh on the first Monday of April, 1879, to answer to the Monongahela National Bank of Brownsville, Pa., a corporation organized under the laws of the United States, and doing business at Brownsville, in the western district of Pennsylvania, in an action in assumpsit.

And have you then and there this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Pittsburgh, this 2d day of April, A. D. 1879, and in the 103rd year of the Independence of the said United States.

[SEAL.] H. D. GAMBLE, *Clerk.*

30 (Endorsed:) No. 109. May term, 1879. Circuit Court of the United States. The Monongahela National Bank of Brownsville, Pa., *vs.* Azariah Stephens. Summons. Knox & Reed, attorneys for plaintiff.

WAYNESBURG, PA.

Served the within writ personally and by copy on Azariah Stephens, April 4, 1879, at his residence in Greene co.

JOHN HALL, *U. S. M.*,
Per JOHN H. CAMPBELL,
Deputy U. S. M.

31 *Narr.*

In the Circuit Court of the United States for the western district of Pennsylvania, May term, 1879.

Azariah Stephens, the defendant, was summoned to answer the Monongahela National Bank of Brownsville, a corporation organized and doing business under the laws of the United States, located at Brownsville, within the western district of Pennsylvania, the plaintiff, of a plea of trespass on the case. Whereupon the said plaintiff by Knox & Reed, its attorneys, complains for that whereas Barzilla Stephens on the 10th day of Oct., in the year of our Lord one thousand eight hundred and seventy-four, at Brownsville, Penn., to wit, at the district aforesaid, did make his certain promissory note in writing and delivered the same to R. S. Long, and thereby promised to day to the order of R. S. Long ten thousand five hundred and seventy-five dollars at the Monongahela National Bank of Brownsville in 25 days after the date thereof, which period has now elapsed, and the said R. S. Long then and there endorsed and delivered the same to Barzilla Stephens, and the said Barzilla Stephens then and there endorsed and delivered the same to Azariah Stephens, and the said Azariah Stephens then and there endorsed and delivered the same to the plaintiff above named, and the said Barzilla Stephens did

32 not pay the amount thereof, although the same presented to him on the day when it became due, all of which the defendant then and there had due notice. By reason whereof, and by force of the statute in such case made and provided, the said defendant became liable to pay the said plaintiff the said sum of money in said note mentioned, and being so liable he, the said defendant, on himself did assume and to the said plaintiff did promise the payment of the said sum of money in said note mentioned when he should be thereunto afterwards required. And whereas also said defendant heretofore, to wit, on the first day of April, in the year of our Lord one thousand eight hundred and seventy-nine, at Pittsburgh, in the district aforesaid, was indebted to the said plaintiff in the sum of twenty thousand dollars for the price and value of goods, wares and merchandise then and there sold and delivered by the plaintiff to the defendant at his request.

And in the sum of twenty thousand dollars for the price and value

of work then and there done and material for the same provided by the plaintiff for the defendant at his request.

And in the sum of twenty thousand dollars for money then and there lent and advanced to and paid, laid out, and expended by the plaintiff for the defendant at his request.

33 And in the sum of twenty thousand dollars for money then and there received by the defendant for the use of the plaintiff, and in the sum of twenty thousand dollars for money found to be due from the defendant to the plaintiff on an account then and there stated between them.

And whereas the defendant afterwards, to wit, the day and year aforesaid, in consideration of the premises then and there promised to pay the said several sums of money respectively to the plaintiff on request, yet hath disregarded his promises and hath not paid any of the said moneys, or any part thereof; to the plaintiff's damage twenty thousand dollars, and therefore it brings suit.

KNOX & REED,
Attorneys for Plaintiff.

(Endorsed:) No. 109; May term, 1879; the Monongahela National Bank of Brownsville, Pa., *vs.* Azariah Stephens; narr; filed April 4, 1879; Knox & Reed.

34 *Affidavit of Defence.*

Circuit Court of the United States, in and for the western district of Pennsylvania.

THE MONONGAHELA NATIONAL BANK of Brownsville, Pa., a corporation organized under the laws of the United States and doing business at Brownsville, in the western district of Pa., *vs.* AZARIAH STEPHENS.	No. 109 of May term, 1879.

WESTERN DISTRICT OF PENNA., *ss.*

Barzilla Stevens, the defendant, being duly sworn, says that he has a just and legal defence to the whole of the plaintiff's claim in this suit, the nature and character of which is as follows:

1. That the said Circuit Court of the United States for the western district of Pennsylvania has no jurisdiction over this case for the following reasons, to wit:

That the plaintiff bank on the 13th day of April, 1875, brought suit against the defendant on the same note which is the basis of this suit, and for the same cause of action, in the Court of Common Pleas of Greene county, Pa., at No. 52, June term, 1875, the defendant being summoned to appear in said Com-

35 mon Pleas on the 1st Monday of May, 1875; that the defendant appeared accordingly, made affidavit of defence to the whole of plaintiff's claim, and put in his pleas of set-off, etc.

The case being put at issue, was tried before a jury in said Court of Common Pleas, on April 11, 1876, and a verdict rendered against defendant for the sum of $8,592.96. During the trial certain exceptions to the rulings of the court were taken by both the plaintiff and defendant. Judgment having been entered on said verdict, the defendant, by writ of error at No. 111, Oct. and Nov. term, 1876, removed the record in said case—No. 52, June term, 1875—into the Supreme Court of Pennsylvania for review. Paper books were prepared on both sides, and said case was argued in said Supreme Court on Nov. 19, 1878. On January 6, 1879, said Supreme Court rendered its decision reversing the court below, and sent the case back for retrial in said Common Pleas. That said case was put down for trial again at the head of the list of causes for trial at April term, 1879, in and by the order of said Common Pleas; that on March 19, 1879, after said case was so put down for retrial, the plaintiff bank, by Messrs. Sayers and Sayers, its attorneys, wrote at the foot of the appearance docket entries of said case, the following words, to wit: "We hereby discontinue this suit, March 19,
36 1879, (signed) Sayers & Sayers, att'ys for pl'ff"; that such entry was made without the knowledge or consent of the defendant, without any leave had or obtained therefor from said Court of Common Pleas, and without the costs in said suit being paid; that the defendant has never assented to such discontinuance; that no leave therefor from said Court of Common Pleas has been obtained and the costs have not been paid; that the plaintiff has attempted such discontinuance and brought the present suit for the purpose of vexing and oppressing the defendant, and causing him to litigate the case at a great distance from his home and the homes of his witnesses, and at greatly increased trouble and expense; that thereby the defendant has been obliged to employ additional counsel, resident at Pittsburgh, and will be put to great additional and unnecessary expense by a trial of this case there, which he cannot recover from the plaintiff; that the plaintiff has attempted such discontinuance for the further purpose of raising in this court the question whether, at the time the note in suit and the prior note of which it was the last renewal were taken by said bank, there were in Pennsylvania state banks of issue authorized by the laws of said state to take, receive, re-
37 serve and charge upon their loans and discounts interest at the rate of nine (9) per cent. per annum, or at such rate as might be agreed upon between the borrower and such alleged banks of issue, and for the purpose of preventing in this case a final determination of said question by the Supreme Court of Pennsylvania. That at the time of such attempted discontinuance and the bringing of this suit the plaintiff knew that said U. S. Circuit Court had decided said question adversely to the views of the defendant and his counsel, and, being fearful that the Supreme Court of Pa. would decide the said question differently from said U. S. Circuit Court when this case should again go up to said Supreme Court from the Court of

Common Pleas of Greene county, Pa., where the pl'ff originally brought it, the plaintiff, after pursuing the defendant from April 13th, 1875, to March 19, 1879, in the courts of said state, seeks to deprive the defendant of the right to have said question decided and set at rest by the Supreme Court of Pa. That said question involves the construction of certain Pennsylvania statutes, and the plaintiff knew that a decision thereof by the Supreme Court of Pa. would be
38 final and conclusive and would be binding upon the parties and the courts of the United States. The plaintiff therefore attempts to prevent such final decision of the question, and hopes thereby to get judgment against the defendant, by its said illegal proceedings, for a larger sum than it is legally entitled to recover. The defendant submits that his rights should not thus be disregarded.

2. That the Court of Common Pleas of Greene county, Pa., first acquired jurisdiction over the parties and the cause of action in this suit by the act of the plaintiff bank, and still retains such jurisdiction to the exclusion of this court.

3. That defendant never got any of the money loaned upon the original of the note in suit or any of its renewals; that he never signed or endorsed any note of this series except the note in suit; that he endorsed it at the special request of the pl'ff bank and W. S. Long, and was known to the bank to be nothing more than an accommodation endorser or surety thereon; that plaintiff bank knowingly drew the note in suit for a larger amount than was due the plaintiff thereon in view of the usury taken by it from Israel Stephens, and the defendant endorsed it, as aforesaid, relying upon the bank's representation that it was for the proper amount; that said representation was untrue to the extent of the usury so taken from Israel Stephens, misled the defendant, and he is, therefore, not liable on the note, as he did not know when he endorsed it that such usury had been taken by plaintiff.

4. That the plaintiff, being a national bank, organized in 1865, under the act of Congress of June 3, 1864, relating to national banks, and located at Brownsville, in the state of Pennsyl-
39 vania, had, at the time the note in suit and the prior notes of which it was the last renewal were taken, no right to take, receive, reserve and charge interest and discount on its loans, or lend money at the rate of nine (9) per cent. per annum, or at any rate of interest higher than six (6) per cent. per annum in advance. That at the times said notes were taken there were no *state banks of issue* in the state of Pennsylvania authorized by their charters, or the laws of Pennsylvania, to lend money at the rate of nine (9) per cent. per annum, or at any greater rate of interest than six (6) per cent. per annum in advance. That the banks named in the plaintiff's affidavit of amount due, to wit, the Peoples' Bank of Philadelphia, the United States Banking Company, the Butchers' and Drovers' Bank and the Franklin Bank of the city of Philadelphia, were not, and never have been, *banks of issue*, and never issued their own bank notes. That the said Franklin Bank of the city of Philadel-

phia never did business. That the said U. S. Banking Com-
40 pany did not begin business till September, 1873, which was subsequent to the taking of the original of the note in suit and the 1st renewal thereof. The said Butchers' and Drover's Bank surrendered its state charter and afterwards became the Keystone National Bank. The U. S. Banking Company failed and quit business. The banks named were deposit and discount banks, and not *banks of issue* in any sense.

5. That the original of the note in suit was discounted and taken by the plaintiff bank on Aug. 27, 1872, the money actually loaned and advanced thereon to Israel Stephens, the maker of the note, being $9,545.00. That said original note and loan was renewed by four (4) subsequent notes, the last being the note in suit. That upon said loan and each renewal thereof the plaintiff knowingly took, received, reserved, and charged interest at the rate of nine (9) per cent. per annum, the interest so taken aggregating $2,036.00. That all of said interest was so knowingly taken, received, reserved, and charged by the plaintiff bank contrary to law, and the defendant is entitled to set off the same against the money loaned on the original of the note in suit. That by reason of exacting and taking the usurious interest aforesaid the plaintiff forfeited said entire inter-
41 est and is not entitled to receive or claim any interest upon said loan, or upon any of the notes taken therefor.

6. That the plaintiff bank has knowingly taken, received, reserved, and charged at various times within the six years immediately prior to April 5th, 1876, when the defendant put in his plea of set-off against the plaintiff's claim on the note in suit in the Court of Common Pleas of Greene county, Pa., discount and interest in excess of the amount permitted by its fundamental law upon *other* loans made by it to Israel Stephens, a principal debtor on the original note, which illegal interest amounts to the sum of $3,532.00, and all of which is a proper set-off against the plaintiff's claim in this suit.

7. That the plaintiff has in its possession, or power, a large sum of money, to wit, the sum of $3,241.00, which it has illegally taken and received from R. S. Long within the six years immediately prior to April 6, 1876, (when defendant as aforesaid put in his plea of set-off in said Court of Common Pleas,) as principal, interest, and
42 discount on *various other* loans made by plaintiff. That R. S. Long was a principal debtor upon the original of the note in suit and its several renewals, and was so known to the plaintiff. The defendant is, therefore, entitled to credit in this suit for said sum of $3,241.10 so illegally taken and received by the plaintiff from said Long.

8. That the plaintiff, on May 14, 1875, got judgment against said R. S. Long on the note in this suit in the Court of Common Pleas of Greene county, Pa., at No. 51, June term, 1875, for the full amount of the note and interest. After legal notice to the bank to proceed and collect this judgment at once, or the defendant would

hold himself discharged from all liability on the note, the bank on May 28, 1875, issued execution on said judgment. Between
43 the issuing and the levy of said execution the plaintiff permitted said Long, against the consent of the defendant, to remove, secrete and otherwise dispose of, for his own benefit, and to the great damage of the defendant, (if defendant is liable on said note,) a large amount of personal property upon which said execution was a lien, which was then worth at least $1,000. That on June 3d, 1875, the plaintiff levied by virtue of said execution on all the real estate of said Long in Cumberland township, Greene county, Pa., containing 260 acres of land, out of which the plaintiff's claim might then have been made. Shortly afterwards and before sale the plaintiff directed the sheriff to do nothing further with the execution till he got further orders from the plaintiff. The plaintiff having failed to proceed with its judgment and execution against Long, the defendant, on June 18, 1875, served a written notice upon the plaintiff to proceed and collect said judgment against Long as speedily as the law would permit, and that any and every failure to so proceed and collect said judgment would be urged as an additional defence by the defendant against the note and claim in suit. The plaintiff wholly disregarded said notices, lost the lien of, and finally
44 stayed the execution against Long, and has ever since persistently refused to proceed and collect said judgment. Long's real estate has since said levy depreciated in value from three to four thousand dollars, so that the proceeds of all his said realty and of the personal property yet remaining in his hands would not now be sufficient, by at least $3000.00, to pay the plaintiff's claim on the note in suit. Long being a real debtor and the defendant nothing more than a mere surety on the note in suit, and both having been so known to pl'ff from the beginning, the plaintiff's claim, so far as the defendant is concerned, is paid to the extent of the value of the personal property which it permitted Long to convert to his own use as aforesaid, and to the further extent of the depreciation in value of Long's real estate since the plaintiff's levy thereon.

9. That the rate of interest limited for banks of issue organized under the laws of the state of Pennsylvania was, at the times the original of the note in suit and its several renewals were taken and still is, six (6) per cent. per annum in advance and no more. That all the statements contained in this affidavit of defence are true and correct so far as the same are stated from the defendant's own knowledge, and that so far as the same are stated from information he believes them to be true and correct; and further, that he expects to be able to prove all of said statements on the trial of this case.

AZARIAH STEPHENS.

Sworn to and subscribed this 24th day of April, 1879, before me.

H. D. GAMBLE,
Clerk U. S. Ct. Ct.

(Endorsed:) No. 109; May term, 1879; U. S. Circuit Court, W. dist. of Pa.; the Monongahela National Bank of Brownsville, Pa., *vs.* Azariah Stephens; affidavit of defence; filed April 24, 1879; H. D. Gamble, clerk; T. C. Lazear, A. A. Purman and P. A. Knox.

45 *Receipt of Prothonotary of Greene Co. for Costs.*

Monongahela National Bank of Brownsville *vs.* Barzilla Stephens.	No. 50, June term, 1875; costs, $30.10.
Same, pl'ff, *vs.* Azariah Stephens, endorser of Barzilla Stephens.	No. 52, June term, 1875; costs, $30.15.
Same, pl'ff, *vs.* Barzilla Stephens, adm'r of Israel Stephens, dec'd.	No. 53, June term, 1875; costs, $26.95.
Same, pl'ff, *vs.* Barzilla Stephens, endorser of Israel Stephens, dec'd.	No. 54, June term, 1875; costs, $27.25.

April 28, 1879, rec'd of pl'ff, by hands of E. M. Sayers, one hundred and fourteen 45-100 in full of costs in the above cases. See duplicate receipts on docket.

G. W. ULLOM, *Pro.*

(Endorsed:) Nos. 106, 107, 108, & 109, May term, 1879; Monongahela National Bank *vs.* Barzilla Stephens et al.; receipt of prothonotary of Greene county for costs; notice hereof given P. A. Knox, esq., personally; J. W. M.; filed April 30, 1879; Knox & Reed.

46 *Rule for Judgment and Reasons Therefor.*

Circuit Court of the United States for the western district of Pennsylvania.

The Monongahela National Bank *vs.* Barzilla Stephens.	No. 107. May Term, 1879.
Same *vs.* Barzilla Stephens, adm'r of Israel Stephens.	No. 106. May Term, 1879.

SAME
vs.
AZARIAH STEPHENS.
No. 109.
May Term, 1879.

SAME
vs.
BARZILLA STEPHENS.
No. 108.
May Term, 1879.

And now, April 26, 1879, on motion of Knox & Reed, attorneys for the plaintiff in the above cases, a rule is granted upon the defendants in each case to show cause why a judgment should not be entered against them in each case for want of a sufficient affidavit of defence, for the reasons hereto attached.

PER CURIAM.

47 *Reasons.*

First. As to the first paragraphs of the defendants' affidavits of defence, to wit, that this court has no jurisdiction of these causes for certain reasons therein specified, plaintiff says that same is not true as a proposition of law, and that upon defendants' own showing this court has jurisdiction of said cases.

Second. As to the second paragraphs of said affidavits, plaintiff denies that the proposition of law therein announced are true in law.

Third. That as to the third paragraphs of said affidavits, plaintiff claims that the allegations therein contained would constitute no defence to these actions if the same were true. That said allegations of fact are not true on the defendants' own showing, inasmuch as no usurious interest was charged on the loan represented by the note in suit.

Fourth. As to the fourth paragraphs of said affidavits of defence, plaintiff claims they contain no allegations of fact which, if true, would defeat plaintiff's right to recover from the defendants the full amount of its claim. As to the conclusion of law therein contained, plaintiff denies that the same are sound and correct.

Fifth. As to the allegations of fact contained in the fifth, sixth, and seventh paragraphs of defendants' affidavits, plaintiff says
48 they would constitute no defence if true. As to the conclusions of law therein contained, plaintiff denies that they are correct.

Sixth. As to the remaining allegations of fact and statements of conclusions of law in said affidavits, plaintiff claims they are wholly inadequate as a defence to its suits.

Seventh. That said affidavits as a whole are informal, insufficient, and defective, and assuming the facts to be as the defendants allege them, they constitute no defence to the plaintiff's claim.

KNOX & REED,
April 26, 1879. *Plaintiff's Attorneys.*

From the record.
[SEAL.]
April 26, 1879.

H. D. GAMBLE,
Clerk.

(Endorsed:) Nos. 106, 107, 108, and 109, May term, 1879; Monongahela National Bank of Brownsville *vs.* Barzilla Stephens et al.; rule and reasons for judgment for want of sufficient affidavit of defence; received by mail April 28th, 1879, at 8 p. m.; P. A. Knox, attorney for defendants.

49 *Notice of hearing of rule for judgment and service.*

In the Circuit Court of the United States for the western district of Pennsylvania.

MONONGAHELA NATIONAL BANK of Brownsville, Pa., *vs.* AZARIAH STEPHENS. } No. 109. May term, 1879.

To PURMAN and KNOX, def't's att'ys:

Take notice, that the rule to show cause why judgment should not be entered in this case for want of a sufficient affidavit of defence will be called up for argument on Tuesday morning, May 27th, 1879.

KNOX & REED,
AND SAYERS & SAYERS,
Pl'ff's Att's.

May 24, 1879.

(Endorsed:) No. 109, May term, 1879; Monongahela Nat. Bank of Brownsville *vs.* Azariah Stephens; proof of service; filed May 27, 1879.

May 24, 1879, 11.30 a. m.

Served this day personally on Purman and Knox, def't's att'ys, by reading the within notice to them and by giving Mr. Knox a true copy of the same. So says

JAS. E. SAYERS.

Aff'd and sub'd to this 24th day of May, 1879, coram.

[SEAL.] G. W. ULLOM, *Pro.*

50 *Supplemental affidavit of defence.*

In the Circuit Court of the United States for the western district of Pennsylvania.

THE MONONGAHELA NATIONAL BANK *vs.* AZARIAH STEPHENS. } No. 109, May term, 1879.

WESTERN DISTRICT OF PENNSYLVANIA, *ss.*

Barzilla Stephens, agent in this behalf of the above-named defendant, as a further defence to the above action says that the said defendant, as deponent believes and expects to be able to prove, signed

the note in suit before the same was filled up, by merely endorsing a blank piece of paper, which was afterwards filled up in plaintiff's bank for the amount therein stated, in the absence of defendant and without his knowledge of the amount thereof, which amount includes a sum for interest exceeding six per cent. per annum, and that said defendant did not agree to pay such usurious interest, as affiant is informed and expects to be able to prove.

B. STEPHENS.

Sworn and subscribed before me this 27th May, 1879.

H. D. GAMBLE, *Clerk.*

(Endorsed:) No. 109; May term, 1879; the Mon. Nat. Bk., Brownsville, *vs.* Azariah Stephens; supplemental affidavit of defence; filed May 27, 1879.

51 *Order making rule for judgment absolute.*

In the Circuit Court of the United States for the western district of Pennsylvania.

THE MONONGAHELA NATIONAL BANK of Brownsville *vs.* AZARIAH STEPHENS. } No. 109, May term, 1879.

Rule to show cause why judgment should not be entered in the above-stated case in default of a sufficient affidavit of defense, argued by W. S. Purviance and P. C. Knox, esq'r's, for rule, and contra by T. C. Lazear and P. A. Knox, esq'r's; and after consideration by the court, rule made absolute and judgment directed to be entered in favor of the plaintiff therein.

52 *Precipe for judgment.*

In the Circuit Court of the United States for the western district of Pennsylvania.

MONONGAHELA NATIONAL BANK of Brownsville, Pa., *vs.* AZARIAH STEPHENS. } No. 109, May term, 1879.

To H. D. GAMBLE, esq., clerk:

Enter judgment in above case as per order of court this day entered making absolute the rule for judgment for want of a sufficient affidavit for defence.

Liquidate as follows:

Debt	$10,575 00
Interest from Nov. 7, 1874	2,881 25
Protest fees	1 85
Total	$13,458 10

KNOX & REED,
Pl'ff's Att'ys.

May 27, 1879.

(Endorsed:) No. 109; May term, 1879; Monongahela National Bk. *vs.* Azariah Stephens; præc. for judgment; filed May 27, 1879, at 4.50 p. m.; H. D. Gamble, clerk; Knox & Reed.

53 *Judgment Docket Entry.*

No.	Term.	Year.	Defendant.	Plaintiff.	Date of judgment	Debt.	Costs.	Attorney.
109	May.	1879	Azariah Stephens.	Monongahela National Bank of Brownsville.	May 27, 1879.	$13,458 10	$25 70	

54 *Petition for Writ of Error and Affidavit.*

In the Circuit Court of the United States for the western district of Pennsylvania.

THE MONONGAHELA NATIONAL BANK of Brownsville, Pa., *vs.* AZARIAH STEPHENS. } No. 109, May term, 1879.

To the Hon. WM. MCKENNAN, judge of said court:

Azariah Stephens, defendant above named, feeling aggrieved by the judgment entered against him in the above case, is desirous of having the same reviewed by the Supreme Court of the United States. He therefore prays that a writ of error may be allowed for such purpose.

AZARIAH STEPHENS.

WESTERN DISTRICT OF PA., *ss.*

Azariah Stephens, the above-named defendant, being duly sworn, says that he does not sue out the writ of error in above case for the purpose of delay.

AZARIAH STEPHENS.

Affirmed to and subscribed before me this 6th June, 1879.

H. D. GAMBLE, *Clerk.*

(Endorsed:) No. 109, May term, 1879; Monongahela National Bank, Brownsville, *vs.* Azariah Stephens; petition for writ of error and affidavit. Filed May 26, 1881.

55 UNITED STATES OF AMERICA, ss.

The President of the United States to the honorable the judges of the United States Circuit Court for the western district of Pennsylvania, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court before you, between the Monongahela National Bank of Brownsville, Pa., plaintiff, and Azariah Stephens, defendant, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on the 2nd Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 18th day of May, A. D. 1881.

[SEAL.] H. D. GAMBLE,
Clerk.

Allowed by— W. McKENNAN, *Cir. Judge.*

(Endorsed:) Writ of error; filed May 26, 1881.

56 UNITED STATES OF AMERICA, } *sct.*
Western district of Pennsylvania, }

To the Monongahela National Bank of Brownsville, Pa., greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., on the 2nd Monday of October next, pursuant to a writ of error filed in the clerk's office of the United States Circuit Court, wherein Azariah Stephens is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness my hand this eighteenth day of May, A. D. 1881.

W. McKENNAN,
Judge of U. S. Cir. Court.

1881, June 7th. Served the above citation on Knox & Reed, attorneys for the Monongahela National Bank of Brownsville Pa., by

producing to J. H. Reed, of the firm of Knox & Reed, at their office in Pittsburgh, Pa., the above citation, and leaving with him a true copy hereof, on the day above mentioned.

JAS. G. BELL.

Sworn and subscribed to before me this 9th day of June, 1881.

S. McCANDLESS,
Clerk U. S. District Court, western dist. of Penna.

57 In the Circuit Court of the United States for the western district of Pennsylvania.

THE MONONGAHELA NATIONAL BANK of Brownsville, Pa., *vs.* AZARIAH STEPHENS. } No. 109, May term, 1879.

WESTERN DISTRICT OF PENNSYLVANIA, *ss.*

I, H. D. Gamble, clerk of the Circuit Court of the United States for the said district, do hereby certify that the annexed and foregoing pages contain a true copy of the record and proceedings in the above-entitled case, so full and entire as the same remains of record and on file in my office.

In testimony whereof I have hereunto signed my name and affixed the seal of the said court, at Pittsburgh, this 16th day of June, A. D. 1881.

H. D. GAMBLE,
Clerk.

[SEAL.]

WESTERN DISTRICT OF PENNSYLVANIA, *ss.*

I, M. W. Acheson, acting judge of the United States Circuit Court for said district, do hereby certify that H. D. Gamble above named was, at the time of making the above certificate, and is now, clerk of the said court, and that the said certificate made by him is in due form of law.

M. W. ACHESON,
Acting U. S. Circuit Judge.

Pittsburgh, June 16, 1881.

(Endorsed on cover:) W. Pennsylvania, C. C. U. S.; No. 258; Azariah Stephens, pl'ff in error, *vs.* The Monongahela National Bank of Brownsville, Pa.; filed 27 June, 1881; 57 pages.

111-197

FEB 21 1884

JAMES H. McKENNEY, CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1883.

No. 256.

Barzilla Stephens, Plaintiff in Error,

vs.

The Monongahela National Bank, of Brownsville, Pa., Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

Brief and Argument for Plaintiff in Error.

P. A. KNOX and C. E. BOYLE,

COUNSEL FOR PLAINTIFF IN ERROR.

INDEPENDENT BOOK AND JOB PRINT, Waynesburg, Pa.

IN THE
Supreme Court of the United States.
OCTOBER TERM, 1883.
No. 256.

Barzilla Stephens, Plaintiff in Error,

vs.

The Monongahela National Bank, of Brownsville, Pa., Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

STATEMENT.

This suit was brought April 2, 1879, in said Circuit Court of the United States for the Western District of Pennsylvania, by said bank against Barzilla Stephens, the plaintiff in error, to charge him as *indorser* of a certain note made by one Israel Stephens, dated May 16, 1874, for the sum of $9,500, and payable at said bank to the order of said Barzilla Stephens six months after the date thereof. Upon the back of this note

the names of the said Barzilla Stephens, R. S. Long, and of Israel Stephens, the maker, appeared; that of the maker being last. In addition to the narr, the bank filed a long affidavit of claim alleging many things *dehors* the note sued on. The principal allegations related to its organization as a national bank; its location in said Western District of Pa.; its alleged right, by reason of certain Pennsylvania statutes, to take, receive, reserve and charge on its loans and discounts, interest at the rate of nine (9) per cent. per annum, or at such rate as might be agreed upon between the bank and the borrower, because, as it alleged, there were in the State of Pennsylvania certain *alleged banks of issue*, authorized by certain Pennsylvania statutes and charters, which were made part of its affidavit of claim, to take, receive, reserve and charge interest on their loans and discounts at the rates above stated; and that the interest charged by the bank upon the loan and each renewal thereof, represented by the note in suit, was at the rate of not to exceed nine (9) per centum per annum, etc.

The plaintiff in error duly made and filed an affidavit of defense and a supplemental affidavit of defense to the whole of the bank's claim, (*see printed record, pages* 14–19 *and pages* 22–23), in which he alleged *inter alia*:

1. That the said Circuit Court of the United States had no jurisdiction over this suit, because of a prior suit between the same parties, for the same cause of action, brought April 13, 1875, by said bank against the plaintiff in error, and still pending in a court of the same State of Pa. and within said Western District thereof, to-wit: in the Court of Common Pleas of Greene Co., Pa. That after pursuing the plaintiff in error in said Court of Common Pleas and in the Supreme Court of Pa. from April 13, 1875, for the same cause of action, and after said prior suit had, by the order of said Court of Common Pleas, been set down for re-trial at the head of the list of causes for

trial at April term, 1879, the said bank had, on March 19, 1879, by its attorneys, written at the foot of the appearance docket entries of said prior suit, the following words, to-wit: "We hereby discontinue this suit, March 19, 1879, (signed) Sayers & Sayers, att'ys for pl'ff." That such entry was made without the knowledge or consent of the plaintiff in error, without any leave had or obtained therefor from said Court of Common Pleas, and without the costs in said prior suit being paid. That the plaintiff in error had never assented to such discontinuance. That no leave therefor from said Court of Common Pleas had been obtained, and the costs had not been paid.

That the bank had attempted such discontinuance and brought the present suit, for the purpose of vexing and oppressing the plaintiff in error, and causing him to litigate the case at a great distance from his home and the homes of his witnesses, and at greatly increased cost, trouble and expense. That thereby the plaintiff in error had been obliged to employ additional counsel, resident at Pittsburgh, and would be put to great additional and unnecessary expense by a trial of this case there, which he could not recover from said bank. That said bank had attempted such discontinuance for the further purpose of raising in said U. S. Circuit Court the question whether, at the time the note in suit and the prior notes of which it was the last renewal were taken by said bank, there were in Pennsylvania, *State banks of issue* authorized by the laws of said State, to take, receive, reserve and charge upon their loans and discounts interest at the rate of nine (9) per cent. per annum, or at such rate as might be agreed upon between the borrower and such alleged banks of issue, and for the purpose of preventing *in this case* a final determination of said questions by the Supreme Court of Pa. That at the time of such attempted discontinuance and the bringing of this suit,

said bank knew that said U. S. Circuit Court had decided said question adversely to the views of the plaintiff in error and his counsel, and being fearful that the Supreme Court of Pa. would decide said question differently from said U. S. Circuit Court when *this case* should again go up to said Supreme Court of Pa. from the said Court of Common Pleas of Greene county, Pa., where the bank originally brought it, the said bank, after pursuing the plaintiff in error from April 13, 1875, to March 19, 1879, in the courts of said State, sought to deprive the plaintiff in error of the right to have said question decided and set at rest by the Supreme Court of Pa. That said question involved the construction of certain Pennsylvania statutes, and the bank knew that a decision thereof by the Supreme Court of Pennsylvania would be final and conclusive, and be binding upon the parties and the courts of the United States. That said bank, therefore, attempted to prevent such final decision of the question, and hoped thereby to get judgment against the plaintiff in error, by its said illegal proceedings, for a larger sum than it was legally entitled to recover.

That the Court of Common Pleas of Greene county Pa., first acquired jurisdiction over the parties and the cause of action in this suit by the act of the said bank, and still retained such jurisdiction to the exclusion of the said U. S. Circuit Court.—(*See Printed Record, pages* 14–16, *and Specification in Error No.* 1.)

2. That the plaintiff in error never got any of the money loaned upon the original of the note in suit, or any of its renewals, and, if at all liable thereon (which he denied), he was, at the times said notes were taken, known to the said bank to be and was nothing more than an accommodation endorser, or surety thereon, for Israel Stephens and R. S. Long, who were both known to said bank to be the real debtors on said notes.

That the plaintiff below being a national bank, organized in

1865, under the act of Congress of June 3, 1864, and located at Brownsville, in the State of Pennsylvania, had, at the time the note in suit and the prior notes of which it was the last renewal were taken, no right to take, receive, reserve and charge interest and discount on its loans, or lend money at the rate of nine (9) per cent. per annum, or at any rate of interest higher than six (6) per cent. per annum in advance. That at the times said notes were taken, there were no *State banks of issue* in the State of Pennsylvania authorized by their charters, or the laws of Pennsylvania, to lend money at the rate of nine (9) per cent. per annum, or at any greater rate of interest than six (6) per cent. per annum in advance. That the banks named in the said bank's affidavit of amount due, to-wit: the People's Bank of Philadelphia, the United States Banking Company, the Butchers' and Drovers' Bank, and the Franklin Bank of the city of Philadelphia, were not, and never had been, *banks of issue*, and had never issued their own bank notes. That the banks named were deposit and discount banks, and not *banks of issue* in any sense. That the original of the note in suit was discounted and taken by the plaintiff bank on June 27, 1871, the money loaned and advanced thereon to Israel Stephens, the maker, being $8,434.65. That said original note and loan was renewed by six (6) subsequent notes made by Israel Stephens, the last being the note in suit.—(*Printed Record, pages* 16 *and* 17.) That the rate of interest limited for banks of issue organized under the laws of the State of Pennsylvania was, at the times the original of the note in suit and its several renewals were taken, and still was, six (6) per cent. per annum in advance and no more.—(*Printed Record, page* 19.) That upon said loan and each of its renewals the plaintiff below knowingly took, received, reserved and charged interest at the rate of nine (9) per cent. per annum, the interest so taken aggregating $2,736.50. That all

of said interest was so knowingly taken, received, reserved and charged by the plaintiff bank contrary to law, and the plaintiff in error was entitled to set-off the same against the money loaned on the original of the note in suit. That by reason of exacting and taking the usurious interest aforesaid the plaintiff bank forfeited said entire interest, and was not entitled to receive or claim *any interest upon said loan,* OR UPON THE NOTE IN SUIT.—(*Printed Record, page* 17.) (*See Printed Record at above pages, and Specification in Error No. II.*)

3. That the paper upon which the note in suit was written had no writing upon it at the time it was delivered to the plaintiff bank, except the names of B. Stepheus and R. S. Long across the back of it; that the said bank, by its teller, then and there wrote the whole of the body of the note, the plaintiff in error not being present; that the note so written was then signed by Israel Stephens, the maker and last endorser thereof, and filed away by the bank without being submitted to the plaintiff in error for his approval; that the plaintiff bank knowingly took, received, reserved and charged interest upon the said note, at the time it took the same in excess of six (6) per cent. per annum in advance, without the knowledge or consent of the plaintiff in error; that said bank, by its teller, illegally and knowingly, and without the knowledge or consent of the plaintiff in error, drew the note in suit for the sum of $9,500.00, and at the same time knew, in view of the usury taken by the plaintiff bank from Israel Stephens, that there was then less than $6,000.00 due on the original loan, or to become due thereon, on the due date of the note in suit. That the plaintiff in error, by his indorsement of said blank paper, only authorized the plaintiff bank to draw a renewal note thereon for the amount actually and legally due on the loan, or to become due thereon at the due date of the note in suit, and only authorized legal interest to be taken for the

time the note had to run. That the note in suit was, therefore, *not the contract of the plaintiff in error*, and, *as against him, was void.*—(*See Printed Record, page* 18, *and Specification, in Error No. III.*)

4. That the plaintiff bank had knowingly taken, received reserved and charged at various times within the six years immediately prior to April 11, 1876, when the plaintiff in error put in his plea of set-off against the bank's claim on the note in suit in the Court of Common Pleas of Greene county, Pa., discount and interest in excess of the amount permitted by its fundamental law upon other loans made by it to Israel Stephens, a principal debtor on and maker of the note in suit, which illegal interest amounted to $3,532.00, and all of which was a proper set-off against the bank's claim in this suit, provided plaintiff in error did not get credit therefor in case No. 108, of May T., 1879, in said U. S. Circuit Court.

That said bank had illegally taken and received from R. S. Long, who was known to it to be a principal debtor on the note in suit, within the six years aforesaid, the sum of $3,241.10, as principal, interest and discount on various other loans made by said bank, for which sum plaintiff in error was entitled to credit in this suit, provided he did not get credit therefor in said case at No. 108, May Term, 1879.—(*See Printed Record, pages* 17 *and* 18, *and specification in error No. IV.*)

In the court below, the defendant in error *demurred to and admitted* all the facts alleged in the plaintiff in error's affidavits of defense and ruled him to show cause why judgment should not be entered against him and in favor of the bank for want of a sufficient affidavit of defense.—(*Printed Record, pages* 20 *and* 21.)

This rule to show cause why judgment should not be entered for want of a sufficient affidavit of defence, was called up for argument before his honor, Judge Ketcham, then U. S.

District Judge for the Western District of Pa, whilst sitting at Chambers separate and apart from the U. S. Circuit Judge for said District, although the record fails to show by whom the matter was heard and determined, and, also, fails to show any order or direction to the said Judge Ketcham to act in the matter.

The matter was argued by counsel on May 27, 1879, before the said Judge Ke'cham, and, on the same day, he ordered that said rule to show cause be made absolute, and directed and caused judgment to be entered against the plaintiff in error, and in favor of the bank, for the sum of $12,078,87, being the full amount of the note sued on with interest from its due date to the date of the judgment, and protest fees.—(*See Printed Record, pages* 23 *and* 24.)

The bank's *demurrer* to the plaintiff in error's affidavits of defense was, therefore, fully sustained by the Court below.—(*See Printed Record, pages* 20, 21, 23 *and* 24.)

The Specifications of Error, present for the determination of the Supreme Court, the following principal questions:

1st. As to the jurisdiction of the U. S. Circuit Court over this case.

2d. Whether there are, in the State of Pa, *State banks of issue* authorized by the laws of said State, or by their Pa. charters, to charge interest upon their loans and discounts at the rate of nine per cent. per annum, or at such rate as may be agreed upon between such banks and the borrower.

3d. Whether the bank forfeited, and the plaintiff in error, who was only liable, if at all, as an accommodation indorser, and was so known to the bank, was entitled to set-off the entire interest taken, received, reserved and charged by the bank at nine (9) per cent. per annum on the loan and its several renewals.

4th. Whether the bank was entitled to recover any interest upon the loan, or upon the *note in suit.*

5th. Whether the note in suit was void as to the plaintiff in error.

6th. Whether the plaintiff in error was entitled to set-off the said sums so illegally taken, etc., on other loans by the bank, from Israel Stephens and R. S. Long, principal debtors on the note in suit.

Specifications of Error.

I. The Court below erred in overruling the *first* and *second* paragraphs of the Plaintiff in Error's affidavit of defense, and the *second* section of his supplemental affidavit of defense, and in holding the same to be insufficient in law to prevent judgment against him, which paragraphs and section were duly sworn to and filed, and were as follows, to-wit:

(Paragraph 1.) "That the Circuit Court of the United States for the western district of Pennsylvania has no jurisdiction over this case for the following reasons, to-wit:

That the plaintiff bank on the 13th day of April, 1875, brought suit against the defendant on the same note which is the basis of this suit, and for the same cause of action in the Court of Common Pleas of Greene County, Pa., at No. 54, June term, 1875; the defendant being summoned to appear in said Common Pleas on the first Monday of May, 1875. That the defendant appeared accordingly, made affidavit of defense to the whole of plaintiff's claim, and put in his pleas of set-off, etc. The case, being put at issue, was tried before a jury in said Court of Common Pleas, on April 11, 1876, and a verdict rendered against the defendant for the sum of $9,210.57. During the trial, certain exceptions to the rulings of the court were taken by both the plaintiff and defendant. Judgment having been entered on said verdict, the defendant, by writ of error at No. 113, Oct. and Nov. term, 1876, removed the record

in said case—No. 54, June term, 1875—into the Supreme Court of Pennsylvania for review. Paper books were prepared on both sides, and said case was argued in said Supreme Court on Nov. 19, 1878. On January, 6, 1879, said Supreme Court rendered its decision reversing the court below, and sent the case back for re-trial in said Common Pleas. That said case was put down for trial again at the head of the list of causes for trial at April term, 1879, in and by the order of said Common Pleas. That on March 19, 1879, after said case was so put down for re-trial, the plaintiff bank, by Messrs. Sayers & Sayers, its attorneys, wrote at the foot of the appearance docket entries of said case, the following words, to-wit: "We hereby discontinue this suit, March 19, 1879, (signed) Sayers & Sayers, att'ys for pl'ff." That such entry was made without the knowledge or consent of the defendant, without any leave had or obtained therefor from said Court of Common Pleas, and without the costs in said suit being paid. That the defendant has never assented to such discontinuance. That no leave therefor from said Court of Common Pleas has been obtained and the costs have not been paid. That the plaintiff has attempted such discontinuance and brought the present suit for the purpose of vexing and oppressing the defendant, and causing him to litigate the case at a great distance from his home and the homes of his witnesses, and at greatly increased cost, trouble and expense. That thereby the defendant has been obliged to employ additional counsel, resident at Pittsburgh, and will be put to great additional and unnecessary expense by a trial of this case there, which he cannot recover from the plaintiff. That the plaintiff has attempted such discontinuance for the further purpose of raising in this court the question whether, at the time the note in suit and the prior notes of which it was the last renewal were taken by said bank, there were in Pennsylvania state banks of issue

authorized by the laws of said State to take, receive, reserve and charge upon their loans and discounts interest at the rate of nine (9) per cent. per annum, or at such rate as might be agreed upon between the borrower and such alleged banks of issue, and for the purpose of preventing in this case a final determination of said questions by the Supreme Court of Pennsylvania. That at the time of such attempted discontinuance and the bringing of this suit the plaintiff knew that said U. S. Circuit Court had decided said question adversely to the views of the defendant and his counsel, and, being fearful that the Supreme Court of Pa. would decide the said question differently from said U. S. Circuit Court when this case should again go up to the said Supreme Court from the Court of Common Pleas of Greene county, Pa., where the plaintiff originally brought it, the plaintiff, after pursuing the defendant from April 13th, 1875, to March 19, 1879, in the courts of said State, seeks to deprive the defendant of the right to have said question decided and set at rest by the Supreme Court of Pa. That said question involves the construction of certain Pennsylvania statutes, and the plaintiff knew that a decision thereof by the Supreme Court of Pa. would be final and conclusive, and would be binding upon the parties and the courts of the United States. The plaintiff, therefore, attempts to prevent such final decision of the question, and hopes thereby to get judgment against the defendant, by its said illegal proceedings, for a larger sum than it is legally entitled to recover. The defendant submits that his rights should not thus be disregarded."

(Paragraph 2.) "That the Court of Common Pleas of Greene county, Pa., first acquired jurisdiction over the parties and the cause of action in this suit by the act of the plaintiff bank, and still retains such jurisdiction to the exclusion of this court." (*Printed Record, pages* 15 *and* 16.)

(Section 2.) "And deponent further says that up to the present time the costs of the suit upon said note in the Common Pleas Court of Greene county have not been paid in full, the fees of witnesses, depositions, etc., still remaining unpaid."—(*Printed Record, page* 23.)

II. The Court below erred in overruling the 3d, 4th, 5th and 10th paragraphs of the plaintiff in error's affidavit of defense and in sustaining the demurrer thereto, which paragraphs were duly sworn to and filed, and were as follows, to-wit:

(Paragraph 3.) "That the defendant never got any of the money loaned upon the original of the note in suit, or any of its renewals, and, if at all liable thereon (which he denies), he was, at the times said notes were taken, known to the plaintiff bank to be and was nothing more than an accommodation endorser or surety thereon for Israel Stephens and R. S. Long, who were both known to said bank to be the real debtors on said notes."

(Paragraph 4.) "That the plaintiff, being a national bank, organized in 1865, under the act of Congress of June 3, 1864, relating to national banks, and located at Brownsville, in the State of Pa., had, at the time the note in suit and the prior notes of which it was the last renewal were taken, no right to take, receive, reserve and charge interest and discount on its loans, or lend money at the rate of nine (9) per cent. per annum or at any rate of interest higher than six (6) per cent. per annum in advance. That at the times said notes were taken, there were no *State banks of issue* in the State of Pennsylvania authorized by their charters, or the laws of Pennsylvania, to lend money at the rate of nine (9) per cent. per annum, or at any greater rate of interest than six (6) per cent. per annum in advance. That the banks named in plaintiff's affidavit of amount due, to-wit, the People's Bank of Philadelphia, the United States Banking Company, the Butchers' and Drovers' Bank,

and the Franklin Bank of the city of Philadelphia, were not, and never have been, *banks of issue*, and never issued their own bank notes. That the said Franklin Bank of the city of Philadelphia, never did business. That the said Butchers' and Drovers' Bank did not commence business till September 26, 1871, and the said U. S. Banking Company did not begin business till September, 1873, both dates being subsequent to the taking of the original of the note in suit, and said last date being also subsequent to the 4th renewal of the original note. The said Butchers' and Drovers' Bank surrendered its State charter and afterwards became the Keystone National Bank. The U. S. Banking Company failed and quit business. The banks named were deposit and discount banks, and not *banks of issue* in any sense."

(Paragraph 5.) "That the original of the note in suit was discounted and taken by the plaintiff bank on June 27, 1871; the money loaned and advanced thereon to Israel Stephens, the maker of the note, being $8,434.65. That said original note and loan was renewed by six (6) subsequent notes made by Israel Stephens, the last being the note in suit. That upon said loan and each of its renewals the plaintiff bank knowingly took, received, reserved and charged interest at the rate of nine per cent. per annum, the interest so taken aggregating $2,736.50. That all of said interest was so knowingly taken, received, reserved and charged by the plaintiff bank contrary to law, and the defendant is entitled to set off the same against the money loaned on the original of the note in suit. That by reason of exacting and taking the usurious interest aforesaid, the plaintiff forfeited said entire interest and is not entitled to receive or claim any interest upon said loan, or upon the note in suit."—(*Printed Record, pages* 16 *and* 17.)

(Paragraph 10.) "That the rate of interest limited for banks of issue organized under the laws of the State of Pennsylvania

was, at the times the original of the note in suit and its several renewals were taken and still is, six (6) per cent. per annnm in advance and no more."—(*Printed record, page* 19.)

III. The Court below erred in overruling the 8th paragraph of the plaintiff in error's affidavit of defense, and the 1st section of his supplemental affidavit of defense, and in sustaining the demurrer thereto, which paragraph and section were duly sworn to and filed, and were as follows:

(Paragraph 8.) "That the paper upon which the note in suit was written had no writing upon it at the time it was delivered to the plaintiff bank, except the names of P. Stephens and R. S. Long across the back of it; that the plaintiff, by its teller, then and there wrote the whole of the body of the note, the defendant not being present. That the note so written was then signed by Israel Stephens, the maker and last indorser thereof, and filed away by the bank without being submitted to the defendant for his approval. That the plaintiff bank knowingly took, received, reserved, and charged interest upon said note, at the time it took the same, in excess of six (6) per cent. per annum in advance, without the knowledge or consent of the defendant. That said bank, by its teller, illegally and knowingly, and without the knowledge or consent of defendant, drew the note in suit for the sum of $9,500.00, and at the same time knew, in view of the usury taken by the plaintiff from Israel Stephens, that there was then less than $6,000.00 due on the original loan, or to become due thereon, on the due date of the note in suit. That the defendant, by his endorsement of said blank paper, only authorized the plaintiff bank to draw a renewal note thereon for the amount actually and legally due on the loan, or to become due thereon at the due date of the note in suit, and only authorized legal interest to be taken for the time the note in suit had to run. The note in

suit is, therefore, not the contract of the defendant, and, as against him, is void."—(*Printed Record, page* 18.)

(Section 1.) "Barzilla Stephens, being duly sworn, says as a further defence to the above action, that when the note in suit was presented to him for indorsement the note was not filled up, but was a blank paper, filled up afterward by the teller of the plaintiff bank, and deponent was not present, nor did he know what amount was filled in to complete said note, and he says, therefore, that he did not agree to pay the usurious interest charged in said note as part thereof, which interest was in excess of six (6) per cent. per annum.— (*Printed Record, pages* 22 *and* 23.)

IV. The Court below erred in overruling the 6th and 7th paragraphs of the plaintiff in error's affidavit of defense, and in sustaining the demurrer thereto, which paragraphs were duly sworn to and filed, and were as follows:

(Paragraph 6.) "That the plaintiff bank has knowingly taken, received, reserved, and charged at various times within the six years immediately prior to April 11th, 1876, when the defendant put in his plea of set-off against the plaintiff's claim on the note in suit in the Court of Common Pleas of Greene county, Pa., discount and interest in excess of the amount permitted by its fundamenal law upon *other* loans made by it to Israel Stephens, a principal debtor on and maker of the note in suit, which illegal interest amounts to the sum of $3,532.00, and all of which is a proper set-off against the plaintiff's claim in this suit, provided defendant does not get credit therefor in case No. 108 of May term, 1879."—(*Printed Record, page* 17.)

(Paragraph 7.) "That the plaintiff has in its possession, or power, a large sum of money, to-wit, the sum of $3,241.10, which it has illegally taken and received from one R. S. Long, within the six years immediately prior to April 11, 1876, (when the defendant put in his plea of set-off against the plaintiff's

claim on the note in suit in the Court of Common Pleas of Greene county, Pa.,) as principal, interest, and discount on *various other* loans made by plaintiff. That R. S. Long was a principal debtor upon the original of the note in suit and its several renewals, and was so known to the plaintiff. The defendant is, therefore, entitled to credit in this suit for said sum of $3,241.10 so illegally taken and received by the plaintiff from said Long, provided defendant does not get credit therefor in case No. 108 of May term, 1879; $1,891.10 of said sum was so illegally taken by the plaintiff on November 3d, 1874." —(*Printed Record, pages* 17 *and* 18.)

V. The Court below errred in overruling the plaintiff in error's affidavits of defense, in sustaining the demurrer thereto, and in making absolute the Rule for judgment for want of a sufficient affidavit of defense.—(*See Printed Record, pages* 1 *and* 23.)

VI. The Court below erred in directing and causing judgment to be entered in favor of the defendant in error and against the plaintiff in error, for the full amount of the note in suit and interest thereon from its due date (Nov. 19, 1874) to the date of the judgment, (May 27, 1879), and protest fees, thus making an aggregate judgment of $12,078.87 against the plaintiff in error.—(*See Printed Record, pages* 23 *and* 24.

P. A. KNOX,

COUNSEL FOR PLAINTIFF IN ERROR.

Argument and Authorities.

All the errors alleged and complained of are shown *by the record* from the Court below, and will be considered here without a formal bill of exceptions. Appearing upon the face of the record, and being "set out separately and particularly" in the Specifications of Error, they are, under the rulings of this Court, entitled to consideration.

Errors that are patent upon the record, are open to revision here, without any motion in arrest of judgment, or exception taken in the Court below.

Bennett v. Butterworth, 11 How., 669.
Garland v. Davis, 4 How., 131.
Slacum v. Pomery, 6 Cranch, 221.
Balt. & Pot. R. R. Co. v. Trustees, Etc., 1 Otto, 130.
Supervisors v. Kennicott, 13 Otto, 556-557.

Mr. Justice WASHINGTON in delivering the opinion of the Supreme Court in *Macker's Heirs v. Thomas*, 7 Wheaton, 532, said:

"It is objected, in the last place, that if the plaintiffs have a right to prosecute this writ of error, they nevertheless cannot assign for error the order of the Court reviving the suit, because they failed in that Court to appear and except to the opinion of the Court in relation to the order. But an exception to the opinion of the Court is only necessary when the alleged error could not otherwise appear upon the record."

Because of the erroneous order in that case, which was only shown by the record and not excepted to, the judgment of the Court below was *reversed* and *annulled* and the suit therein *abated* by the Supreme Court.

In *Graham* v. *Bayne*, 18 How., 60, the rule was held by the

Supreme Court to be, "*That when error does not appear on the face of the record, or on a demurrer*, a bill of exceptions is the only mode of bringing a case before it for review."

The case of *Barnet* v. *National Bank*, 8 Otto, 555, was considered by this Court, although there was no exception in the record—the court below having sustained a demurrer to an affidavit of defense. Mr. Justice SWAYNE, in delivering the opinion of the Supreme Court in that case says, on page 557:

"The bank demurred to the several defences set up by the assignees. To the first and third the demurrer was sustained, and overruled as to the second. Upon the latter the plaintiff took issue, and the case was tried by a jury. The jury rendered a verdict in favor of the bank for $4,080.31, and judgment was given accordingly. It does not appear that anything done by the Court touching this trial was objected to by the plaintiffs in error. *There is no bill of exceptions in the record.*

But one point has been insisted upon by the plaintiffs in error in this Court, and it is that the Circuit Court erred *in sustaining the demurrers to their first and third defenses. That is the only subject before us for examination.*"

In the Supreme Court of Pennsylvania, any error appearing upon the record willl be considered without an exception—WOODWARD, C. J., in delivering the opinion of that Court in *Wheeler v. Winn*, 53 Penn. St., 129, says:

"The old practice was not dispensed with but only added to, and now we have, 1st, the bill of exceptions given by the Statute of Edward; * * * 2nd, the whole charge filed under the Act of 1806, and the Act of 15th of April, 1856. * * * 3rd, Points and answers written out and filed, is another Statutory method of bringing the law of the case upon the record without a bill of exceptions.

And as in either of these modes the matter to be reviewed is brought *upon the record*, and the writ of error which goes to

the whole record, brings it necessarily into the Court of error, counsel may come here and assign errors upon any part of that record, and it is our duty to notice them. * * * That no exception appears of record is immaterial."

The above decision in *Wheeler v. Winn*, 53 Penn St., 129, was afterwards cited and approved by the Supreme Court of Pa., in *Pennsylvania Railroad Co. v. Berry*, 68 Penn. St., p. 279.

Other citations on this point are deemed unnecessary.

Do the affidavits of defense in this case constitute a part of the record?

After *demurring to and admitting* all the facts stated in said affidavits of defense, and after persuading the Court below to sustain its demurrer and make absolute its rule for judgment for want of a sufficient affidavit of defense, the defendant in error will not now be permitted to say that said affidavits of defense do not constitute a part of the record. *The bank, by its own acts, has made them a part of the record*, if they were not such before, and has thereby obtained the erroneous order and judgment of which we complain.

Balt. & Pot. R. R. Co. v. Trustees, Etc., 1 Otto, 127.
Barnet v. National Bank, 8 Otto, 557.

I.

AS TO THE JURISDICTION OF THE U. S. CIRCUIT COURT.

In the Court below, the counsel for the bank relied on Stanton et. al. v. Embrey, Admr., 3 Otto, 548; Smith v. Lathrop, 44 Penn St., 326; White v. Whitman, 1 Curtis 494; Bowne v. Joy, 9 Johns. 221; Wadleigh v. Veasie, 3 Sumn. 167, and other similar cases.

But these cases, so far as we have had an opportunity to examine them, are not in point, and do not decide the question of jurisdiction raised here.

The decision in Stanton v. Embrey Admr., 3 Otto, 548, is stated in the 2d paragraph of the syllabus thus: "2. The

pendency of a prior suit in a *State* court is not a bar to a suit in a Circuit Court of the United States, or in the Supreme Court of the District of Columbia, by the same plaintiff against the same defendant for the same cause of action."

It will be observed that this decision by the Supreme Court was made in a suit begun in the Supreme Court of the District of Columbia in which "the defendants pleaded in abatement the pendency of a suit against them, by the same plaintiff and for the same cause of action, *in the State of Connecticut*; to which plea the plaintiff demurred. The Court sustained the demurrer," &c.—p. 549-553.

The former suit pleaded was not in a Court of the same district or State. It was not in a *domestic* tribunal, but in a *foreign* one, according to decisions relied upon by the bank. Here, the prior suit pleaded was not only in *a Court of the same State* in which the U. S. Circuit Court was held, but in the *same district* over which it had jurisdiction. It was clearly in a *domestic* Court and both suits were in Courts of the same State, which had *concurrent jurisdiction* of such cases and, as to each other, were not in any sense, *foreign* tribunals.

Com. v. Pittsburg & Connellsville R. R. Co., 58 Penn. St., 43-44.
Claflin v. Houseman, 3 Otto, 136–139.
Insurance Co. v. Brune's Assignee, 6 Otto, 592, bottom.
In Ex parte Schollenberger, 6 Otto, 377.
Blake v. Alabama & Chattanooga R. R. Co, 6 Bank. Reg., 332.
Smith v. McIver, 9 Wheaton, 535.
Mollan v. Torrance, 9 Wheaton, 539.
Shelby v Bacon, 10 Howard, 68.
Brooks v. Mills County, Law and Eq. Reporter, vol. 1, p. 25.
Owens v. Gotzian, 4 Dillon, 436.

The case of *Smith v. Lathrop*, 44, Penn. St., 326, which was very much relied upon by the bank's counsel, simply decides, as per the 2nd paragraph of the Syllabus, that:

"The plea of *lis pendens* IN ANOTHER STATE, is not a defense to a suit between the same parties, for the same cause of action, at the same time, in Pennsylvania."

This case arose in the District Court of Philadelphia, and the prior suit pleaded was an action for the same cause, "in the City of New York." Hence, the case is not in point here.

The case of *Bowne & Seymour v. Joy*, 9 Johns., 221, was an action in a New York Court. "The defendant pleaded another action brought by the plaintiffs against the defendant, for the same cause, in the Court of Common Pleas of the County of Bristol, in the State of Massachusetts." Hence, that case does not apply here.

The U. S. Circuit Court for the Western District of Pennsylvania and the Court of Common Pleas of Greene County, Pa., are both Courts of and *within* the State of Pennsylvania, and are both governed and controlled by the laws of said State, except where the Constitution and laws of the United States expressly direct otherwise. Being Courts of and within the same State, and alike subject to its laws, except as aforesaid, they are, as to each other, *domestic* tribunals, both having and exercising jurisdiction and powers conferred by the Constitution and laws of said State and of the United States.

Judge SHARSWOOD, in delivering the opinion of the Supreme Court of Pennsylvania, in *Commonwealth v. Pittsburg & Connellsville Railroad Co.*, 58 Penn St., on pages 43 and 44, says:

"The Circuit Court of the United States is not the court of another soverign. The Federal Constitution is the Constitution of this State, having been ratified and adopted by the sovereign act of the people in convention, December 12, 1787. They made it irrevocably their own by their entering into a solemn compact with the people of their sister States—binding them for all time—unalterably in any other mode than that pointed out by its own terms. The able and eminent first Chief Justice

of this Court, in clear and emphatic language, declared, at a very early day, this fundamental truth of our political system: "The Government of the United States," said McKean, C. J., "forms a part of the government of each State:" Respublica v. Cobbett, 3 Dall. 473. *It follows that its courts are the courts of each State;* they administer justice according to the laws of the State as construed and settled by its own supreme tribunal. This has been more than once solemnly determined by the Supreme Court of the Union to be the rule of their decision, whenever the Constitution of the United States, treaties or Acts of Congress do not come in question: Shelby v. Guy, 11 Wheat. 361; United States v. Morrison, 4 Pet. 124; Green v. Neal, 6 Id. 291; Leffingwell v. Warren, 2 Black 599."

Mr. JUSTICE BRADLEY, in delivering the opinion of the Supreme Court in Claflin v, Houseman. Assignee, 6 Otto, page 136, says: "The general question, whether State Courts can exercise concurrent jurisdiction with the Federal Courts in cases arising under the Constitution, laws and treaties of the United States, has been elaborately discussed, both on the bench and in published treatises,—sometimes with a leaning in one direction and sometimes in the other,— but the result of those discussions has, in our judgment, been, as seen in the above cases, to affirm the jurisdiction, where it is not excluded by express provision, or by incompatibility in its exercise arising from the nature of the particular case.

When we consider the structure and true relations of the Federal and State Governments, there is really no just foundation for excluding the State Courts from all such jurisdiction.

The laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are. The United States is not a foreign sovereignty as regards the several States, but is a concurrent, and, within its jurisdiction, paramount sovereignty. Every citizen

of a State is a subject of two distinct sovereignties, *having concurrent jurisdiction in the States*—concurrent as to place and persons, though distinct as to subject matter. Legal or equitable rights, *acquired under either system of laws*, may be enforced *in any court of either sovereignty* competent to hear and determine such kind of rights and not restrained by its constitution in the exercise of such jurisdiction."

In *ex parte* SCHOLLENBERGER, 6 Otto. 369, the syllabus states that, "Suit was brought in the Circuit of the United States for the Eastern District of Pennsylvania, by a citizen of that State against the company (a foreign insurance company), and process served in accordance with the *State law*, upon its agent so specified, who resided within the district. The service of the process was quashed, because the company was not an inhabitant of or found within the district. *Held*, 1. That the Circuit Court has jurisdiction of the suit, and should proceed to hear and determine it. 2. *That said court is a court of the Commonwealth, within the intent of the statute.*"

In the 8th Circ. (Minn.), in case of *Owens* v. *Gotzian*, 4 Dill. 436, it was held that: "In the Federal Courts sitting within any State, a judgment of either of the courts of the State, is to be deemed a *domestic*, not a *foreign* judgment."

In *Brooks* v. *Mills County*, Law and Eq. Reporter, Vol. 1, page 25, it was held, by the U. S. Circuit Court of Iowa, that: "An action in a State Court can be pleaded in abatement of an action in a Federal Court in the same district."

The U. S. Circuit Court below, being under decisions, both State and Federal, a court *of* and *within* the State of Pennsylvania, it follows that said U. S. Circuit Court and the Court of Common Pleas of Greene county. Pa., in which this suit was first brought, are courts of the *same* State and *domestic* tribunals as to each other. And Mr. Justice STRONG, in delivering the opinion of this Court in *Insurance Co.* v. *Brune's Assignee*, 6 Otto, near bottom of page 592, states the law thus:

"At law, the pendency of a former action between the same parties for the same cause is pleadable in abatement to a second action, because the latter is regarded as vexatious. But the former action must be in a domestic court: that is, in a court of the State in which the second action has been brought."

The former action pleaded here was not only in a court of the same State and in a domestic tribunal, but in one having *concurrent* jurisdiction. In the beginning, the bank had the undoubted right to sue the plaintiff in error in either court, and it elected to sue in the Common Pleas. Sec. 5136, Revised Statutes, empowers national banks: "Fourth. To sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons."

Mr. Justice McLEAN, in delivering the opinion of the Supreme Court, in *Shelby v Bacon*, 10 How., 68, said:

"There is no principle better settled than that, when two or more tribunals have concurrent jurisdiction over the same subject matter and the parties, a suit commenced in any one of them,may be pleaded in abatement to an action for the same cause in any other."

Mr. Chief JUSTICE MARSHALL, in delivering the opinion of this Court in Smith v. M'Iver, 9 Wheat, 535, said:

"In all cases of *concurrent jurisdiction, the court which first has possession of the subject, must decide it.*"

Mr. Justice WOODS, in delivering the opinion of the U. S. Circuit Court of Alabama, in *Blake v The Alabama & Chaitanooga R. R. Co. et al.*, 6 Bank. Reg. 332, said:

"The State Court had jurisdiction of the subject matter of the suit before it and of the parties. Its jurisdiction was first invoked and asserted. It is too well settled to need citations of many authorities that as between courts of concurrent jurisdiction that which first acts is entitled to exercise its jurisdiction to the exclusion of the others. The Courts of the United

States and those of a State have concurrent jurisdiction in many cases, but when persons or property are liable to seizure or arrest by the process of both, that which first attached is entitled to the preference." And he cited: *Ex parte Jenkins*, 2 Wall Jr. 521; *Smith v. M'Iver*, 9 Wheat., 532; *Shelby v. Bacon*, 10 How., 56; *Taylor* v. *Carryl*, 24 How., 583; *Mallet v. Dexter*, 1 Curt. 178; *The Robert Fulton*, 1 Pa., 621; *Ex parte Robinson*, 6 McLean, 355."

In *Ward v Todd*, 13 Otto. 327, it is held that: "A court which has once rightfully obtained jurisdiction of the parties may retain it until complete relief is afforded within the general scope of the subject matter of the suit."

In the 7th Cir. (Ill.), it was held that: Jurisdiction of national courts over suits by or against national banks, is not exclusive, but concurrent with state courts." *Pettilon v Noble*, 7 Biss. 449.

Mr. Justice BRADLEY, in delivering the opinion of this Court n *Claflin v. Houseman, Assignee*, 3 Otto, on page 137, further said:

"The fact that a state court derives its existance and functions from the state laws is no reason why it should not afford relief; because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the State as it is to recognize the State laws. The two together form one system of jurisprudence which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly dlfferent and partly concurrent."

It will be urged however that the affidavits of defense show that the prior suit in the Common Pleas, for the same cause of action, had been discontinued by the bank before the bringing of this suit in the U. S. Circuit Court.

But we submit that, under *all the facts admitted* by the bank's *demurrer* and set forth in the affidavits of defense and in Specification in Error No. 1, there was no proper or legal discontinuance of the said prior suit, between the same parties and sor the same cause of action, in the Courts of Common Pleas of Greene county, Pa. We further hold that no court of justice would evor permit the discontinuance of a suit, properly before it, under the facts and circumstances detailed in said affidavits and specification.

The law upon this subject is so fully and clearly stated by Judge SMITH, in delivering the opinion of the Supreme Court of Pennsylvania, in the case of *The Mechanics' Bank* of the city and county of Philadelphia v. *Fisher*, 1 Rawle, 341, that we quote from that opinion (on pages 346–348) as follows:

"The right of a party to discontinue his suit under proper restrictions is not denied; indeed, generally speaking, it is the right of the party, but is not always a matter of course, for the plaintiff will not be permitted to discontinue where he will gain an advantage by it; nor will he be indulged in doing so, if prejudicial to his opponent, or when leading to vexation or oppression.

In England, in the King's Bench and Common Pleas, it is generally done by obtaining a side bar rule "for leave to discontinue the action upon the payment of costs." But from the case of *Belchier* v. *Gansell*, reported in 4 Burr. 2502, not cited at the bar, it is clear that the rule to discontinue will not be granted if it be intended to oppress the defendant by another suit. To me, it appears the case of Belchier v. Gansell, if not exactly the same as the one before us, is very analogous to it. In that case, a discontinuance had been entered on a side bar rule, and then the plaintiff arrested the defendant again on the very same bonds, only laying the new suit in Middlesex instead of London; but, on motion, the discontiu-

ance was set aside on the ground that it was a trick, and an unwarrantable conduct in the attorney, and that it ought not to have the intended effect.

In this country, in our own courts, the law is established in the same way. In *Pollock* v. *Hall*, 3 Yeates, 42, Chief Justice Shippen says, discontinuances are the acts of the Court, and subject to their discretion. And in *Broom* v. *Fox*, 2 Yeates, 531, the Court say, "Regularly, there can be no discontinuance without leave of the Court." In addition to these cases, there are others which, by a parity of reason, bear on the present case. In *Wikoff* v. *Perot*, 1 Yeates, 38, and *Jackson* v. *Winchester*, 2 Yeates, 529, it is decided, that the defendant cannot withdraw his plea, at the time of trial, to give him the benefit of the conclusion to the jury, without the leave of the court; or, wherever trouble or expense has been incurred by any plea of the defendant's, the court will not give leave to retract the plea. So, in *McCullough* v. *McCullough*, 1 Binn. 214, after an inquest has returned, that the rents and profits will pay in seven years, the plaintiff cannot discontinue his *fieri facias*, and take out a new one, without leave of the court.

I take the result of this doctrine to be, that courts will protect their suitors from vexation, oppression, or an undue advantage, and will not suffer either party to do any act which may have this tendency. In this case, the advantage the plaintiffs proposed to themselves, must be obvious to all, for by discontinuing the suit in Danphin county, where the defendant was at home, and by suing him immeniately for the same cause of action in Philadelphia, where the plaintiffs resided, they would of course, get rid of some inconvenience, expense and trouble; to all of which the defendant would necessarily be exposed, if compelled to attend at Philadelphia. I would then ask, was this not a contrivance, or an attempt on the part of the plaintiffs, not only to gain an advantage over their oppo-

nent, but was it not, also, calculated to vex, and oppress, and expose him to unnecessary expense and inconvenience? Whenever, therefore, it appears that a party discontinues one suit, for the purpose, merely, of instituting another for the same cause of action elsewhere, the court, on motion, will set aside the discontinuance, and re-instate the former suit, and subject the party to the consequences of his own acts. Here the plaintiffs had chosen the place and the tribunal where, and before which, to sue their debtor; having done so, the defendant, on his part, as he had a right, moved in the suit, and filed his determination of record to have the suit decided by arbitrators, of which he noticed the plaintiffs; but, before he had returned home from this service, the plaintiffs gave directions to discontinue their suit; it was discontinued by one not authorized, and without the permission of the court. Under these circumstances, I am not disposed to favour the discontinuance of a suit. * * * * * * *

"Upon the whole, then, this court is of opinion, that where it appears a discontinuance is entered with a view to vex and oppress a defendant, by suing him elsewhere for the same cause of action, and the party, under such circumstances, applies to the court to sanction the discontinuance of the suit, and set aside all subsequent proceedings in the cause, the application should not succeed unless founded in justice and equity; and not, as in the present case, where an advantage is the obvious and necessary consequence to the plaintiffs, and great expense, besides inconvenience, to the defendant. The judgment is, therefore, to be reversed, and the award to stand. Judgment reversed."

In *Pollock* v. *Hall*, 4 Dall., 222, it is said BY THE COURT, on pages 223 and 224, that: "The case of *Sterret v. Chambers et. al.*, induced us to pause, before we decided the point now submitted to our consideration. It does not appear, however,

that the right to discontinue was at all contested in that case; and the other cases, cited from our records, do not import any judicial decision, that would be binding upon us, as authority, on the present occasion.

In this situation, we think we are at liberty to deny the right for which the plaintiff contends; and that the policy of the Legislature, as well as the principles of justice, will sanction the denial. The act of assembly sought to compose strifes, to shorten litigation, by assigning an amicable tribunal, to which the parties might voluntarily resort; and when both have agreed to resort to that tribunal, it would be inconsistent with the general nature of an agreement, to permit one of them alone to withdraw from its jurisdiction. Feuds would be inflamed, instead of being allayed; and suits multiplied instead of being diminished, by such a construction of the law."

The cases of *Schuylkill Bank* v. *Macalester*, and *Same Bk.* v. *Wager*, 6 Watts and Serg., 147, were actions of debt on two bonds for $10,000 each, in which Macalester and Wager were sureties. The defendants entered a rule of reference. On the morning of the day fixed for the appointment of arbitrators, and before they were appointed, the plaintiffs *filed a discontinuance and paid the costs* in each suit. When, however, arbitrators were appointed, as provided by the State law, and were about to proceed, a rule was taken by the plaintiffs to show cause why the appointment of arbitrators and the subsequent proceedings should not be set aside. In deciding these cases, the Supreme Court of Pa. says (6 W. and S., pp. 149) that:

"A right which can be exercised only by permission, is no right at all: *and all the cases show that a discontinuance must be founded on the express or implied leave of the court.* In England this leave is obtained on motion, in the first instance:

and here it is taken without the formality of an application, but subject to be withdrawn on cause shown for it; that is the whole difference. *The act, when the propriety of it is contested, must, in the one shape or the other, have the sanction of the court.*"

After detailing the circumstances, the Supreme Court further says: "The plaintiff is, therefore, bound either to enter a *retraxit*, which would make an end of their (the sureties') legal liability, or proceed to judgment." And the Rules were discharged and discontinuance set aside.

LOWRIE, J., afterwards Chief Justice of Pa., said in deciding the case of *Cooper* v. *Cooper*, 1 Phila. 129, that: "A discontinuance is not a matter of course, as a general rule, but is entered on leave of Court."

HARE, P. J. in *Kennedy* v. *McNickle*, 7 Phila., 217, says: "A discontinuance does not, like a retraxit, operate as an extinguishment of the cause of action, but leaves the plaintiff free to bring another suit. *It will not, therefore, be allowed when the effect is to deprive the defendant of an advantage which he is entitled to retain.*" And he cites *Mechanics' Bank* v. *Fisher*, 1 Rawle, 331-347, already referred to.

And on page 218, he further says: "It is accordingly settled by a uniform practice, from which there has been no variation, either in the English Courts or our own, that the plaintiff cannot withdraw from the suit except on terms that will amount to a perpetual bar, after it has been brought to a point where injury would or might result to the defendant if the withdrawal were permitted." And he refers to Tidd's Practice, 679; Archbold's Chitty's Practice, 208.

In *Davis* v. *Sharpe*, 5 Weekly Notes of Cases, 494, the COURT (Phila. C. P.) says: "In order to discontinue a case, leave of the Court must first be had or obtained."

A party will not be allowed to discontinue, where it will put

his opponent to inconveniences and expense. *Payne v. Grant*, 7 W. N. C. 406.

Brooks v. Prentzell, 10 W. N. C. 319, is to the same effect.

In *Summy v. Hiestand*, 65 Penn. St. 300, the Supreme Court of Pa. decide that:

"Without payment of costs a suit cannot be discontinued."

By the above authorities, it is shown, that from 4 Dallas down to the present, the Supreme and other courts in Pennsylvania have always held that the discontinuance of an action pending in a Court of that State, must be by *leave of the Court* and on *payment* of the *costs* accrued, unless the plaintiff and defendant both assent to such discontinuance.

It may be urged that the record shows that the costs of the prior suit in the Common Pleas were paid because there has been sent up with it from the court below a copy of what purports to be a receipt from the Prothonotary of Greene county, Pa., for the costs in said prior suit.—(*Printed Record, pages* 19 *and* 20.)

This paper does not properly constitute any part of the record—never having been filed by leave of the Court. It appears to have been simply taken to the Clerk's office and marked, "filed April 30, 1879." It is dated April 28, 1879. This was not only subsequent to the bringing of this suit in the U. S. Circuit Court on April 2d, 1879, but was four days after the plaintiff in error had sworn to and filed, in said U. S. Circuit Court, his affidavit of defense, stating that the costs in said prior suit in the Common Pleas had not been paid, and urging that fact as one ground of his defense to the suit in the court below.—(*See Printed Record, pages* 1, 15 *and* 19.)

Being dated and filed subsequent to the bank's rule for judgment for want of a sufficient affidavit of defense and reasons therefor, (*Printed Record, page* 1), it can affect no one but the bank and its demurrer, and would seem to be an admission

that the prior suit had not been properly discontinued before the bringing of the present one.

But, as Mr. Chief Justice MARSHALL stated in the opinion of this court, in *Mollan* v. *Torrance*, 9 Wheat. 539, that: "It is quite clear that the jurisdiction of the Court depends upon the state of things at the time of the action brought, and that after vesting, it cannot be ousted by subsequent events," nothing further need be said here in regard to the alleged payment of costs by the bank after this suit was brought and the plaintiff in error's affidavit of defense had been filed.

The bank, by its demurrer, having admitted that the prior suit in the Common Pleas was between the same parties and for the same cause of action; that it was at issue, and had been tried in the Common Pleas; had then been taken to the Supreme Court and the judgment reversed; had been sent back for re-trial in the Common Pleas, and put at the head of the list for April Term, 1879; that it was marked discontinued by the bank's attorneys, without the knowledge or consent of the plaintiff in error, without any leave from said Court of Common Pleas and without the costs in said prior suit being paid; that the plaintiff in error had never assented to such discontinuance; that no leave therefor from said Court of Common Pleas had been obtained, and that the costs had not been paid; that the bank had attempted such discontinuance, and brought the present suit for the purpose of vexing and oppressing the plaintiff in error, and causing him to litigate the case at a great distance from his home and the homes of his witnesses, and at greatly increased cost, trouble and expense; that he had been put to and would be put to great additional and unnecessary expense which he could not recover from said bank; that the bank had attempted such discontinuance and brought the present suit for the purpose of preventing, *in this case*, a final determination by the Supreme Court of

Pennsylvania of the question whether there were in said State, certain State banks of issue authorized, by the laws of said State, to take, receive, reserve and charge upon their loans and discounts, interest at the rate of nine (9) per cent. per annum, or at such rate as might be agreed upon between the borrower and such alleged banks of issue, and all the other facts and circumstances set forth in said affidavits of defense, and shown by the 1st Specification of Error; we submit that the facts, so admitted by the bank, show beyond all question that the Court below had no proper or legal jurisdiction over this suit.

But it may be said that the affidavits of defense are informal and did not properly set forth and exhibit the facts to the Court below.

If so, we refer to the late case of *McPherson* v. *Allegheny National Bank*, 96 Penn. St. page 139, where the law as to the requisites of an affidavit of defense in Pennsylvania is stated by the Supreme Court of that State in an opinion delivered by Mr. Justice GREEN. Near the close of the opinion (p. 139) he says:

"How then, in the face of the defendant's denial, can any judgment be rendered against him on the present state of the record? It is sufficient if an affidavit of defence sets forth facts showing a substantial *prima facie* defence, which can probably be established. It is not necessary for the defendant to meet by his oath every objection or argument against his case which fine critical skill may deduce: Leibersperger v. The Reading Savings Bank, 6 Casey 531. An affidavit of defence is sufficient, if it set forth in words or by necessary inference therefrom, the indispensable elements of a good defence: Selden v. Neemes, 7 Wright 421. An affidavit which puts the plaintiff upon proof of any matter *dehors* the instrument sued on, is sufficient to prevent judgment: Hunter v. Reilly, 12 Casey 509. We are clearly of opinion that the affidavit of defence was sufficient to put the plaintiff to proof, and that there

was error in entering judgment against the defendant. Judgment reversed."

To show that the facts relied upon by the plaintiff in error were sufficient and sufficiently stated in his affidavits of defense in the Court below to prevent judgment, we need only add the words of Mr. Chief Justice WAITE, in delivering the opinion of the Supreme Court in *Atlantic & Pacific R. R. Co.* v. *Hopkins*, 4 Otto. p. 13, that:

"As the practice in the courts of the United States must conform as near as may be to that in the courts of the States, Rev. Stat., Sect. 914, these decisions construing the practice acts of the State are binding upon the courts of the United States."

II.

As to whether the bank took, received, reserved, or charged usurious interest, and the effect of so doing.

Sections 5197, and 5198 Rev. Stat., are as follows:

"Any association may take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory or district where the bank is located, and no more, except that where by the laws of any State a different rate is limited for banks of issue, organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this title. When no rate is fixed by the laws of the State, or Territory or district, the bank may take, receive, reserve, or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. And the purchase, discount, or sale of a bona-fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at no more than the current rate of exchange for sight drafts in addition

to the interest, shall not be considered as taking or receiving a greater rate of interest.

SEC. 5198. The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same; provided such action is commenced within two years from the time the usurious transaction occurred."

Since this case was argued and decided in the Court below, the Supreme Court of Pennsylvania has finally decided in the case of *Lebanon National Bank* v. *Karmany*, 98 Penn. St., 65, that:

"*There are no banks of issue in Pennsylvania authorized to receive interest at a higher rate than six per cent.*"

Mr. Justice Trunkey, in delivering the opinion of the Supreme Court of Pa., in that case, on page 73, says:

"The defendant asked instructions that the banks named in the special plea are banks of issue, under the laws of this Com monwealth, within the meaning of section 5197 of the R. S. U. S., to which the court answered: "It does not appear that the banks named are banks of issue, having the right to charge a rate of interest greater than six per cent. per annum. And in fact, and in law, there is no bank of issue in Pa. authorized to charge a rate of interest in excess of the legal rate." This ruling was in accord with the opinion of Agnew, C. J., in First Nat. Bank of Clarion v. Gruber, 6 Nor. 468, and with the subsequent decision of this court in the same: 8 W. N. C. 119. At the sec-

ond trial nearly all the same charters were pleaded as in this case. It is not alleged that these banks ever did issue circulating notes. It was not the legislative intent that they should have that right. Until their charters were construed to give it by national banks, it was not suspected that such power had been granted."

In the same opinion, on page 74, it is further said: "In answer to the defendant's twelfth and thirteenth points, the jury were instructed that nothing in the statutes of this Commonwealth, relating to the rate of interest, authorizes banks to take, receive or charge a rate of interest in excess of six per centum per annum." And this instruction was affirmed by the Supreme Court in these words: "The court was clearly right as to the instruction as to the rate of interest banks may receive or charge on loans and discounts." Among the charters before the Court for construction in that case as to whether the banks created thereby were banks of issue, were those of the four banks claimed by the defendant in error in this case to be banks of issue; to-wit: The Franklin Bank of the city of Philadelphia, The United States Banking Company, The People's Bank of the city of Philadelphia, and The Butchers' & Drovers' Bank of Philadelphia, (See *Lebanon National Bank* v. *Karmany*, 98 Penn. St., p. 67.)

The decision in that case, and those cited in the opinion, conclusively settle, as we think, this much debated question. As to the rate of interest in Pennsylvania, the Supreme Court further say, in the above case, on page 74: "In absence of a contract for a less rate, the plain letter of the statute is, six per centum per annum is the lawful rate of interest, and if the parties contract for a greater rate the contract is voidable as to the excess; the debtor need not pay the excess, and if he pays the excess voluntarily, he may recover it back by action."

The Supreme Court of Pa. has since decided said questions

the same way: Columbia Nat. Bank v. Bletz; Pitts. L. J., vol. 13 N. S., p. 489.

It being admitted, then, that the defendant in error knowingly took, received, reserved and charged upon the loan and each of its renewals, represented by the note in suit, interest at the rate of nine (9) per cent. per annum, the interest so taken aggregating $2,736.50, (see affidavit of defense, printed record, p. 17, par. 5, and specification in error No. 2), and it being clear that such rate of interest was in excess of that allowed by law to national banks located and doing business in Pennsylvania, what is the effect of such a violation of the law upon the parties to this suit?

In *Farmers', etc., National Bank v. Dearing*, 1 Otto. 29, this Court held (see p. 37) that: "The plaintiff below was entitled to recover the principal of the note sued upon, LESS THE AMOUNT OF THE INTEREST UNLAWFULLY RESERVED."

We claim that the renewals of the original note were merely an extension of the time of payment; and that they and the original note only marked the period of the loan, just as one note, taken for the whole period, would have done. If but one note had been taken for the whole period of the loan, and the said sum of $2,736.50 had been reserved, or charged, as the interest for that period, it is clear that all of said sum would have been forfeited. What difference should it make that the bank violated the law by piecemeal? Should a single violation of the law be condemned, and then cured by repeated violations thereafter?

It has been held that, "Notes are but the evidence of a debt, and the holder may surrender them and recover on the original consideration at his option. They are presumptively but an extension of the time of payment. Cole v. Sacket, 1 Hill, 516; The Kimball, 3 Wallace, 37;" in re Perkins, 10 N. B. R., 534. Now, surely this illegal discount and interest as it was taken

by the bank, was embraced in and made part of every subsequent note. *Campbell v. Sloan*, 62 Penn. St., 484—486; *Overholt v. National Bk. of Mt. Pleasant*, 82 Penn. St., 493—495; *Earnest v. Hoskins*, 100 Penn. St., 559–560; *Walker v. Bank of Washington*, 3 How., 62.

Said illegal discount and interest was, therefore, in the note in suit. Why then should not the defendant be allowed to have the same deducted?

To show that the notes themselves "carried with them the principal loaned and the interest agreed to be paid," we refer to the Receiver of the Ocean National Bank v. Wild, 10 N. B. R., 578, where Woodruff, Cir. J., says: "It follows that the transaction in question was within the prohibition of the National Banking Law, and the bank, *eo instanti*, it made the loan upon the terms exacted, incurred the forfeiture of the entire interest which the notes received carried with them, or which was agreed to be paid thereon. Discounting the notes did not render it less true that the notes themselves carried with them the principal loaned and the interest agreed to be paid, which, with the bonds also given, necessarily included all the pecuniary benefit agreed to be paid as compensation for the loan, whatever form the transaction was made colorably to assume."

The bankrupt, as mere accommodation indorser, or surety, is, upon familiar principles of equity, entitled to all the protection which his principal (the Canal Company) would have if the notes in question were sought to be enforced against it. I do not say that he can recover back money paid by the Canal Company, but he has a right to inquire whether, in view of the forfeiture of the entire interest by the bank, there is anything due to the bank upon the notes which he indorsed, and thereby to ascertain whether and to what extent the notes now in question are without consideration."

It will be said that our views are in conflict with the deci-

sions of this Court in *Barnet v. National Bank*, 98 U. S. 555; and *Driesbach v. National Bank*, 104 U. S., 52.

We contend that, even if these cases last named are adhered to, they should only be made to apply to cases presenting the same state of facts, and that they are clearly distinguishable from this case of Stephens v. the Monongahela National Bank.

In those cases the principal debtors, who were *the parties who had paid the usurious interest*, and their assignees under a deed of assignment for benefit of creditors, were the defendants. The defendants having *paid* the usurious interest, had the right to sue for and recover back twice the interest so paid. Under the statute, it is only the party paying who can recover the penalty of twice the interest paid. No other party to the note can recover this penalty. In this case Barzilla Stephens, the accommodation indorser, or surety, who was so known to the bank and who never paid any interest or discount to the bank on the loan or any of its renewals, is the defendant. He has no right to sue for or recover the penalty of twice the interest, and hence cannot be restricted to that mode of punishing the bank. But a large amount of usurious interest has been paid on the loan, or taken by the bank from the principal debtor. Why can't the plaintiff in error set up the forfeiture of the entire interest and discount, whether incurred by the bank by either its taking, receiving, reserving, or charging usurious interest on the loan and its renewals? He can have no other defence on account of the usury taken, if he is at all liable on the note in suit. As a matter of fact, this will not result in two forfeitures, or penalties, to the bank, for the day has gone by for the principal debtor to sue for the penalty. But does not the statute provide for a forfeiture of the *entire interest*, which is one thing, and for a penalty, *twice the amount of interest*, which is another thing? Why, by construction, eliminate the express forfeiture declared in the statute, except

in the one case where there is a mere stipulation to pay usury without anything being paid or taken?

The statute distinctly declares a forfeiture against National Banks in either of four cases, viz: in either (1) the taking; (2) receiving; (3) reserving; or (4) charging more than the lawful interest. Certainly the taking or receiving usury is more than a mere stipulation to take it. It cannot be taken or received on a loan without being passed over or transferred by some device, from one party to another, and that is payment. Hence for a payment of usury a forfeiture is declared of the *entire interest* in behalf of all parties on the note, as well as a suit for double the *entire* interest in favor of the party who actually paid the usury.

This Court held in *Bank of the U. S.* v. *Owens*, 2 Peters., pp. 537, that: "A profit made or *loss imposed* on the necessities of the borrower, whatever form, shape, or disguise it may assume, where the treaty is for a loan and the capital is to be returned at all events, has always been adjudged to be so much *profit taken* upon a loan, and to be a violation of those laws which limit the lender to a specified rate of interest." And this language was quoted with approval in the opinion of this Court in *Hotel Co.*, v. *Wade*, 97 U. S. pp. 23.

It would seem, therefore, that reserving interest or discount at the inception of a loan is more than a mere stipulation to pay, and that it amounts to a payment by the borrower. We most respectfully suggest that to hold that there is no forfeiture of the entire interest except in case of a mere stipulation to pay, seems to us, to ignore the terms, "taking," "receiving" and "reserving" in the statute to a certain extent.

The party suing for twice the interest don't sue for or recover the *interest* he has paid. He recovers a *specific penalty*, the amount of which is double the amount of interest taken.

Again, in *Barnet* v. *National Bank*, 98 U. S. 555, the 2d de-

fense in which the defendants claimed to set off the entire discount and interest charged and paid upon the loan and the several renewals thereof represented by the bill in suit, was not before the Supreme Court for review—that defense having been sustained by the Court below. The 3d defense in that case sought to set-off double the amount of interest taken on quite a number of bills. And the 1st defense was a general one, relating to the several series of bills, and not confined exclusively to the particular series of bills of which the one in suit was the last.—(*See Printed Record in Barnet v. National Bank, pages* 25, 26 *and* 27.)

Hence, this case is different from that one as presented to the Supreme Court.

It would be strange, indeed, if an accommodation endorser, or an accommodation maker, known to the bank to be such from the beginning of the loan, who never paid any usurious interest, and didn't know of it being included in the note in suit until after it had been taken by the bank, should be held to be in a worse plight than the principal debtor who paid the usury and knowingly contracted to pay it.

It seems to us that if the defendant is entitled to have deducted the entire interest unlawfully taken when the first note was given, as held in *Farmers' & Mechanics National Bank v. Dearing*, 91 U. S. pp. 37, he should, also, be permitted to show the usurious interest taken upon each subsequent renewal note and have the same deducted, and thus prevent the bank from recovering a second time that which it had no right to take in the first place. The case of Driesbach v. National Bank, 104 U. S. 52, and the question whether the bank was entitled to recover any interest on the note in suit after it fell due, will be further discussed in the argument.

III.

We claim that the facts shown by Specification in Error No. 3, are sufficient to show that the note in suit is not the contract

of the plaintiff in error and that as against him it is void.

Under the facts detailed therein, the law will not presume that he intended to enter into a corrupt and illegal contract, such as is now shown to this Court. Whilst the bank, probably, had the right to draw a renewal note for the sum actually loaned, less the usurious discount and interest reserved and taken thereon, yet it could not, without the knowledge or consent of the plaintiff in error, include or put in the note any usurious discount or interest, reserved or taken by the bank on the loan.

This view seems to be supported in an opinion of this Court, delivered by Mr. JUSTICE STORY in *Bank of U. S. v. Waggener*, 9 Peters, 378. It is there said on page 399, that: "It may be proper to remark that, in construing the usury laws, the uniform construction in England has been, (and it is equally applicable here,) that to constitute usury within the prohibitions of the law, there must be an intention knowingly to contract for or to take usurious interest; for if neither party intend it, but act *bona fide* and innocently, the law will not infer a corrupt agreement."

We also refer to Bensinger v. Wren, 100 Penn. St., p. 505 and cases there cited.

IV.

The long affidavit of claim in this case, (printed record pages 2 to 12), was informal as to all statements *dehors* the instrument sued on, except as to the amount of the claim and the bank's title thereto. Imhoff v. Brown, 30 Penn. St., 504.

The affidavits of defense were in proper form, as already shown, and were certainly sufficient to prevent judgment. We, therefore, think it clear that the Court below erred as set forth in the 1st, 2d, 3d, 5th and 6th Specifications of Error.

P. A. KNOX,
C. E. BOYLE,
for Plaintiff in Error.

111-97

FILED
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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1883.

No. 258.

Azariah Stephens, Plaintiff in Error,

vs.

The Monongahela National Bank, of Brownsville, Pa., Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

Brief and Argument for Plaintiff in Error.

P. A. KNOX and C. E. BOYLE,

COUNSEL FOR PLAINTIFF IN ERROR.

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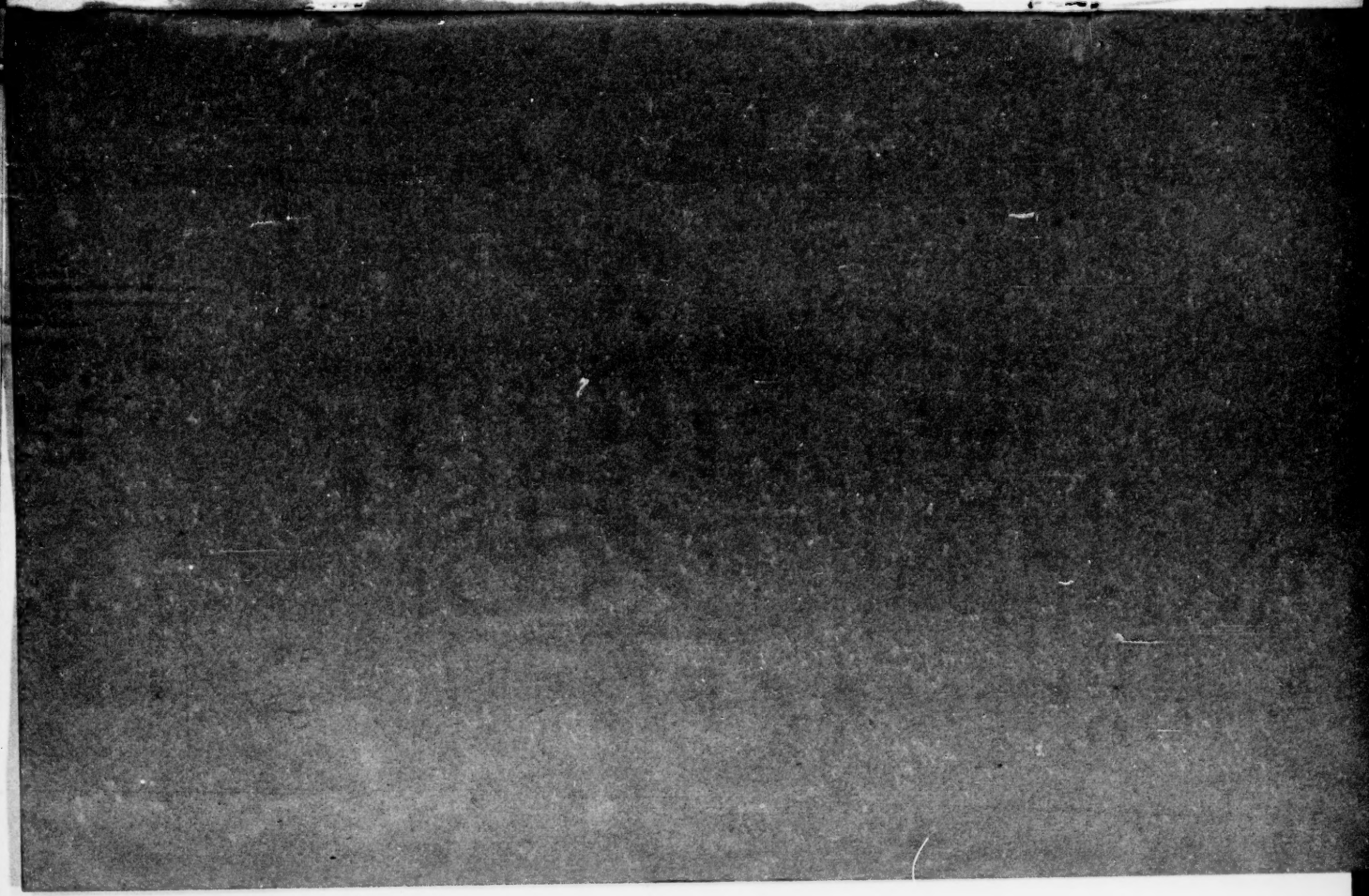

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

STATEMENT.

This suit was brought April 2, 1879, in said Circuit Court of the United States for the Western District of Pennsylvania, by said bank against Azariah Stephens, the plaintiff in error, to charge him as *indorser* of a certain note dated October 10, 1874, for the sum of $10,575, and payable at said bank to the order of R. S. Long 25 days after the date thereof. Upon the back of this note the names of the said R. S. Long, Barzilla

Stephens, and of Az. Stephens, appeared, in the order named. In addition to the narr, the bank filed a long affidavit of claim alleging many things *dehors* the note sued on. The principal allegations related to its organization as a national bank; its location in said Western District of Pa.; its alleged right, by reason of certain Pennsylvania statutes, to take, receive, reserve and charge on its loans and discounts, interest at the rate of nine (9) per cent. per annum, or at such rate as might be agreed upon between the bank and the borrower, because, as it alleged, there were in the State of Pennsylvania certain *alleged banks of issue*, authorized by certain Pennsylvania statutes and charters, which were made part of its affidavit of claim, to take, receive, reserve and charge interest on their loans and discounts at the rates above stated; and that the interest charged by the bank upon the loan and each renewal thereof, represented by the note in suit, was at the rate of not to exceed nine (9) per centum per annum, etc.

The plaintiff in error duly made and filed an affidavit of defense and a supplemental affidavit of defense to the whole of the bank's claim, (*see printed record, pages* 14–19 *and page* 22), in which he alleged *inter alia*:

1. That the said Circuit Court of the United States had no jurisdiction over this suit, because of a prior suit between the same parties, for the same cause of action, brought April 13, 1875, by said bank against the plaintiff in error, and still pending in a court of the same State of Pa. and within said Western District thereof, to-wit: in the Court of Common Pleas of Greene Co., Pa. That after pursuing the plaintiff in error in said Court of Common Pleas and in the Supreme Court of Pa. from April 13, 1875, for the same cause of action, and after said prior suit had, by the order of said Court of Common Pleas, been set down for re-trial at the head of the list of causes for trial at April term, 1879, the said bank had, on March 19, 1879,

by its attorneys, written at the foot of the appearance docket entries of said prior suit, the following words, to-wit: "We hereby discontinue this suit, March 19, 1879, (signed) Sayers & Sayers, att'ys for pl'ff." That such entry was made without the knowledge or consent of the plaintiff in error, without any leave had or obtained therefor from said Court of Common Pleas, and without the costs in said prior suit being paid. That the plaintiff in error had never assented to such discontinuance. That no leave therefor from said Court of Common Pleas had been obtained, and the costs had not been paid.

That the bank had attempted such discontinuance and brought the present suit, for the purpose of vexing and oppressing the plaintiff in error, and causing him to litigate the case at a great distance from his home and the homes of his witnesses, and at greatly increased cost, trouble and expense. That thereby the plaintiff in error had been obliged to employ additional counsel, resident at Pittsburgh, and would be put to great additional and unnecessary expense by a trial of this case there, which he could not recover from said bank. That said bank had attempted such discontinuance for the further purpose of raising in said U. S. Circuit Court the question whether, at the time the note in suit and the prior notes of which it was the last renewal were taken by said bank, there were in Pennsylvania, *State banks of issue* authorized by the laws of said State, to take, receive, reserve and charge upon their loans and discounts interest at the rate of nine (9) per cent. per annum, or at such rate as might be agreed upon between the borrower and such alleged banks of issue, and for the purpose of preventing *in this case* a final determination of said questions by the Supreme Court of Pa. That at the time of such attempted discontinuance and the bringing of this suit, said bank knew that said U. S. Circuit Court had decided

said question adversely to the views of the plaintiff in error and his counsel, and being fearful that the Supreme Court of Pa. would decide said question differently from said U. S. Circuit Court when *this case* should again go up to said Supreme Court of Pa. from the said Court of Common Pleas of Greene county, Pa., where the bank originally brought it, the said bank, after pursuing the plaintiff in error from April 13, 1875, to March 19, 1879, in the courts of said State, sought to deprive the plaintiff in error of the right to have said question decided and set at rest by the Supreme Court of Pa. That said question involved the construction of certain Pennsylvania statutes, and the bank knew that a decision thereof by the Supreme Court of Pennsylvania would be final and conclusive, and be binding upon the parties and the courts of the United States. That said bank, therefore, attempted to prevent such final decision of the question, and hoped thereby to get judgment against the plaintiff in error, by its said illegal proceedings, for a larger sum than it was legally entitled to recover.

That the Court of Common Pleas of Greene county Pa., first acquired jurisdiction over the parties and the cause of action in this suit by the act of the said bank, and still retained such jurisdiction to the exclusion of the said U. S. Circuit Court.—(*See Printed Record, pages* 14–16, *and Specification in Error No.* 1.)

2. That the plaintiff in error never got any of the money loaned upon the original of the note in suit, or any of its renewals, and, if at all liable thereon (which he denied), he was known to the said bank to be and was nothing more than an accommodation endorser, or surety thereon.

That the plaintiff below being a national bank, organized in 1865, under the act of Congress of June 3, 1864, and located at Brownsville, in the State of Pennsylvania, had, at the time the note in suit and the prior notes of which it was the last

renewal were taken, no right to take, receive, reserve and charge interest and discount on its loans, or lend money at the rate of nine (9) per cent. per annum, or at any rate of interest higher than six (6) per cent. per annum in advance. That at the times said notes were taken, there were no *State banks of issue* in the State of Pennsylvania authorized by their charters, or the laws of Pennsylvania, to lend money at the rate of nine (9) per cent. per annum, or at any greater rate of interest than six (6) per cent. per annum in advance. That the banks named in the said bank's affidavit of amount due, to-wit: the People's Bank of Philadelphia, the United States Banking Company, the Butchers' and Drovers' Bank, and the Franklin Bank of the city of Philadelphia, were not, and never had been, *banks of issue*, and had never issued their own bank notes. That the banks named were deposit and discount banks, and not *banks of issue* in any sense.

That the original of the note in suit was discounted and taken by the plaintiff bank on Aug. 27, 1872, the money loaned and advanced thereon to Israel Stephens, the maker, being $9,545.00. That said original note and loan was renewed by four (4) subsequent notes, the last being the note in suit.—(*Printed Record, pages* 16 *and* 17.) That the rate of interest limited for banks of issue organized under the laws of the State of Pennsylvania was, at the times the original of the note in suit and its several renewals were taken, and still was, six (6) per cent. per annum in advance and no more.—(*Printed Record, page* 18.) That upon said loan and each of its renewals the plaintiff below knowingly took, received, reserved and charged interest at the rate of nine (9) per cent. per annum, the interest so taken aggregating $2,036.00. That all of said interest was so knowingly taken, received, reserved and charged by the plaintiff bank contrary to law, and the plaintiff in error was entitled to set-off the same against the

money loaned on the original of the note in suit. That by reason of exacting and taking the usurious interest aforesaid the plaintiff bank forfeited said entire interest, and was not entitled to receive or claim *any interest upon said loan*, OR UPON THE NOTE IN SUIT.—(*Printed Record, page* 17.) (*See Printed Record at above pages, and Specification in Error No. II.*)

3. That plaintiff in error never got any of the money loaned, never signed or endorsed any note of the series except the one in suit, and endorsed it *at the special request of the plaintiff bank* and W. S. Long.—(*Printed Record, page* 16.)

That the plaintiff in error merely endorsed a blank piece of paper which was afterwards filled up in said bank for the amount of the note in suit, in his absence and without his knowledge, and said amount includes a sum for interest exceeding six per cent. per annum; and that he did not agree to pay such ususorious interest.—(*Printed Record, page* 22.)

That the bank knowingly drew the note in suit for a larger amount than was due it thereon, in view of the usury taken by it from Israel Stephens, and the plaintiff in error endorsed it, as aforesaid, relying upon the bank's representation that it was for the proper amount. That said representation was untrue to the extent of the usury so taken from Israel Stephens, misled the plaintiff in error, and he is, therefore, not liable in this suit.—(*Printed Record, page* 18.) (*See Specification in Error No. III.*)

4. That the plaintiff bank had knowingly taken, received reserved and charged at various times within the six years immediately prior to April 5, 1876, when the plaintiff in error put in his plea of set-off against the bank's claim on the note in suit in the Court of Common Pleas of Greene county, Pa., discount and interest in excess of the amount permitted by its fundamental law upon other loans made by it to Israel Stephens, a principal debtor on and maker of all the prior notes,

which illegal interest amounted to $3,532.00, and all of which was a proper set-off against the bank's claim in this suit.

That said bank had illegally taken and received from R. S. Long, who was known to it to be a principal debtor on the note in suit, within the six years aforesaid, the sum of $3,241.10, as principal, interest and discount on various other loans made by said bank, for which sum plaintiff in error was entitled to credit in this suit.—(*See Printed Record, page* 17, *and specification in error No. IV.*)

In the court below, the defendant in error *demurred to and admitted* all the facts alleged in the plaintiff in error's affidavits of defense and ruled him to show cause why judgment should not be entered against him and in favor of the bank for want of a sufficient affidavit of defense.—(*Printed Record, pages* 20 *and* 21.)

This rule to show cause why judgment should not be entered for want of a sufficient affidavit of defence, was called up for argument before his honor, Judge Ketcham, then U. S. District Judge for the Western District of Pa, whilst sitting at Chambers separate and apart from the U. S. Circuit Judge for said District, although the record fails to show by whom the matter was heard and determined, and, also, fails to show any order or direction to the said Judge Ketcham to act in the matter.

The matter was argued by counsel on May 27, 1879, before the said Judge Ketcham, and, on the same day, he ordered that said rule to show cause be made absolute, and directed and caused judgment to be entered against the plaintiff in error, and in favor of the bank, for the sum of $13,458.10, being the full amount of the note sued on with interest from its due date to the date of the judgment, and protest fees.—(*See Printed Record, pages* 22 *and* 23.)

The bank's *demurrer* to the plaintiff in error's affidavits of

defense was, therefore, fully sustained by the Court below.—(*See Printed Record, pages* 20, 21, 22 *and* 23.)

The Specifications of Error, present for the determination of the Supreme Court, the following principal questions:

1st. As to the jurisdiction of the U. S. Circuit Court over this case.

2d. Whether there are, in the State of Pa., *State banks of issue* authorized by the laws of said State, or by their Pa. charters, to charge interest upon their loans and discounts at the rate of nine per cent. per annum, or at such rate as may be agreed upon between such banks and the borrower.

3d, Whether the bank forfeited, and the plaintiff in error, who was only liable, if at all,as an accommodation indorser or, surety, and was so known to the bank, was entitled to set-off the entire interest taken, received, reserved and charged by the bank at nine (9) per cent. per annum on the loan and its several renewals.

4th. Whether the bank was entitled to recover any interest upon the loan, or upon the *note in suit.*

5th. Whether the note in suit was void as to the plaintiff in error.

6th. Whether the plaintiff in error was entitled to set-off the said sums so illegally taken, etc., on other loans by the bank, from Israel Stephens and R. S. Long, principal debtors on the note in suit.

4th. Whether the bank was entitled to recover any interest upon the loan, or upon the *note in suit.*

5th. Whether the note in suit was void as to the plaintiff in error.

6th. Whether the plaintiff in error was entitled to set-off the said sums so illegally taken, etc., on other loans by the bank, from Israel Stephens and R. S. Long, principal debtors on the note in suit.

Specifications of Error.

I. The Court below erred in overruling the *first* and *second* paragraphs of the Plaintiff in Error's affidavit of defense, and in holding the same to be insufficient in law to prevent judgment against him, which paragraphs and section were duly sworn to and filed, and were as follows, to-wit:

(Paragraph 1.) "That the Circuit Court of the United States for the western district of Pennsylvania has no jurisdiction over this case for the following reasons, to-wit:

That the plaintiff bank on the 13th day of April, 1875, brought suit against the defendant on the same note which is the basis of this suit, and for the same cause of action, in the Court of Common Pleas of Greene County, Pa., at No. 52, June term, 1875; the defendant being summoned to appear in said Common Pleas on the first Monday of May, 1875. That the defendant appeared accordingly, made affidavit of defense to the whole of plaintiff's claim, and put in his pleas of set-off, etc. The case, being put at issue, was tried before a jury in said Court of Common Pleas, on April 11, 1876, and a verdict rendered against the defendant for the sum of $8,592.96. During the trial, certain exceptions to the rulings of the court were taken by both the plaintiff and defendant. Judgment having been entered on said verdict, the defendant, by writ of error at No. 111, Oct. and Nov. term, 1876, removed the record

in said case—No. 52, June term, 1875—into the Supreme Court of Pennsylvania for review. Paper books were prepared on both sides, and said case was argued in said Supreme Court on Nov. 19, 1878. On January, 6, 1879, said Supreme Court rendered its decision reversing the court below, and sent the case back for re-trial in said Common Pleas. That said case was put down for trial again at the head of the list of causes for trial at April term, 1879, in and by the order of said Common Pleas. That on March 19, 1879, after said case was so put down for re-trial, the plaintiff bank, by Messrs. Sayers & Sayers, its attorneys, wrote at the foot of the appearance docket entries of said case, the following words, to-wit: "We hereby discontinue this suit, March 19, 1879, (signed) Sayers & Sayers, att'ys for pl'ff." That such entry was made without the knowledge or consent of the defendant, without any leave had or obtained therefor from said Court of Common Pleas, and without the costs in said suit being paid. That the defendant has never assented to such discontinuance. That no leave therefor from said Court of Common Pleas has been obtained and the costs have not been paid. That the plaintiff has attempted such discontinuance and brought the present suit for the purpose of vexing and oppressing the defendant, and causing him to litigate the case at a great distance from his home and the homes of his witnesses, and at greatly increased cost, trouble and expense. That thereby the defendant has been obliged to employ additional counsel, resident at Pittsburgh, and will be put to great additional and unnecessary expense by a trial of this case there, which he cannot recover from the plaintiff. That the plaintiff has attempted such discontinuance for the further purpose of raising in this court the question whether, at the time the note in suit and the prior notes of which it was the last renewal were taken by said bank, there were in Pennsylvania state banks of issue

authorized by the laws of said State to take, receive, reserve and charge upon their loans and discounts interest at the rate of nine (9) per cent. per annum, or at such rate as might be agreed upon between the borrower and such alleged banks of issue, and for the purpose of preventing in this case a final determination of said question by the Supreme Court of Pennsylvania. That at the time of such attempted discontinuance and the bringing of this suit the plaintiff knew that said U. S. Circuit Court had decided said question adversely to the views of the defendant and his counsel, and, being fearful that the Supreme Court of Pa. would decide the said question differently from said U. S. Circuit Court when this case should again go up to the said Supreme Court from the Court of Common Pleas of Greene county, Pa., where the plaintiff originally brought it, the plaintiff, after pursuing the defendant from April 13th, 1875, to March 19, 1879, in the courts of said State, seeks to deprive the defendant of the right to have said question decided and set at rest by the Supreme Court of Pa. That said question involves the construction of certain Pennsylvania statutes, and the plaintiff knew that a decision thereof by the Supreme Court of Pa. would be final and conclusive, and would be binding upon the parties and the courts of the United States. The plaintiff, therefore, attempts to prevent such final decision of the question, and hopes thereby to get judgment against the defendant, by its said illegal proceedings, for a larger sum than it is legally entitled to recover. The defendant submits that his rights should not thus be disregarded."

(Paragraph 2.) "That the Court of Common Pleas of Greene county, Pa., first acquired jurisdiction over the parties and the cause of action in this suit by the act of the plaintiff bank, and still retains such jurisdiction to the exclusion of this court." (*Printed Record, pages* 15 *and* 16.)

II. The Court below erred in overruling the 4th, 5th and 10th paragraphs of the plaintiff in error's affidavit of defense and the 1st part of the 3d paragraph thereof, and in sustaining the demurrer thereto, which paragraphs were duly sworn to and filed, and were as follows, to-wit:

(1st part Paragraph 3.) "That the defendant never got any of the money loaned upon the original of the note in suit, or any of its renewals; that he never signed or endorsed any note of this series, except the note in suit; that he endorsed it at the special request of the plaintiff bank and W. S. Long, and was known to the bank to be nothing more than an accommodation endorser or surety thereon.

(Paragraph 4.) "That the plaintiff, being a national bank, organized in 1865, under the act of Congress of June 3, 1864, relating to national banks, and located at Brownsville, in the State of Pa., had, at the time the note in suit and the prior notes of which it was the last renewal were taken, no right to take, receive, reserve and charge interest and discount on its loans, or lend money at the rate of nine (9) per cent. per annum, or at any rate of interest higher than six (6) per cent. per annum in advance. That at the times said notes were taken, there were no *State banks of issue* in the State of Pennsylvania authorized by their charters, or the laws of Pennsylvania, to lend money at the rate of nine (9) per cent. per annum, or at any greater rate of interest than six (6) per cent. per annum in advance. That the banks named in plaintiff's affidavit of amount due, to-wit, the People's Bank of Philadelphia, the United States Banking Company, the Butchers' and Drovers' Bank, and the Franklin Bank of the city of Philadelphia, were not, and never have been, *banks of issue*, and never issued their own bank notes. That the said Franklin Bank of the city of Philadelphia, never did business. That the said U. S. Banking Company did not begin business till September, 1873, which

was subsequent to the taking of the original of the note in suit, and the 1st renewal thereof. The said Butchers' and Drovers' Bank surrendered its State charter and afterwards became the Keystone National Bank. The U. S. Banking Company failed and quit business. The banks named were deposit and discount banks, and not *banks of issue* in any sense."

(Paragraph 5.) "That the original of the note in suit was discounted and taken by the plaintiff bank on Aug. 27, 1872; the money actually loaned and advanced thereon to Israel Stephens, the maker of the note, being $9,545.00. That said original note and loan was renewed by four (4) subsequent notes, the last being the note in suit. That upon said loan and each renewal thereof the plaintiff bank knowingly took, received, reserved and charged interest at the rate of nine per cent. per annum, the interest so taken aggregating $2,036.00. That all of said interest was so knowingly taken, received, reserved and charged by the plaintiff bank contrary to law, and the defendant is entitled to set off the same against the money loaned on the original of the note in suit That by reason of exacting and taking the usurious interest aforesaid, the plaintiff forfeited said entire interest and is not entitled to receive or claim any interest upon said loan, or upon any of the notes taken therefor."—(*Printed Record, pages* 16 *and* 17.)

(Paragraph 10.) "That the rate of interest limited for banks of issue organized under the laws of the State of Pennsylvania was, at the times the original of the note in suit and its several renewals were taken and still is, six (6) per cent. per annnm in advance and no more."—(*Printed record, page* 18.)

III. The Court below erred in overruling the 2d part of the 3d paragraph of the plaintiff in error's affidavit of defense, and his supplemental affidavit of defense, and in sustaining the demurrer thereto, which paragraph and section were duly sworn to and filed, and were as follows:

(2d part Paragraph 3.) That the plaintiff bank knowingly drew the note in suit for a larger amount than was due the plaintiff thereon, in view of the usury taken by plaintiff from Israel Stephens, and defendant signed it, as aforesaid, relying upon the bank's representation that it was for the proper amount. That said representation was untrue to the extent of the usury so taken from Israel Stephens, misled the defendant, and he is, therefore, not liable in this suit."—(*Printed Record, page* 16.

(Supplemental Affidavit.) "Barzilla Stephens, agent in this behalf of the above named defendant, as a further defence to the above action, says that the said defendant, as deponent believes and expects to be able to prove, signed the note in suit before the same was filled up, by merely endorsing a blank piece of paper, which was afterwards filled up in plaintiff's bank for the amount therein stated, in the absence of defendant, and without his knowledge of the amount thereof, which amount includes a sum for interest exceeding six (6) per cent. per annum, and that said defendant did not agree to pay such usurious interest, as affiant is informed, and expects to be able to prove."—(*Printed Record, pages* 21 *and* 22.)

IV. The Court below erred in overruling the 6th and 7th paragraphs of the plaintiff in error's affidavit of defense, and in sustaining the demurrer thereto, which paragraphs were duly sworn to and filed, and were as follows:

(Paragraph 6.) "That the plaintiff bank has knowingly taken, received, reserved, and charged at various times within the six years immediately prior to April 5th, 1876, when the defendant put in his plea of set-off against the plaintiff's claim on the note in suit in the Court of Common Pleas of Greene county, Pa., discount and interest in excess of the amount permitted by its fundamental law upon *other* loans made by it to Israel Stephens, a principal debtor on the original note, which

illegal interest amounts to the sum of $3,532.00, and all of which is a proper set-off against the plaintiff's claim in this suit, provided defendant does not get credit therefor in case No. 107 of May term, 1879."—(*Printed Record, page* 17.)

(Paragraph 7.) "That the plaintiff has in its possession, or power, a large sum of money, to-wit, the sum of $3,241.10, which it has illegally taken and received from R. S. Long, within the six years immediately prior to April 5, 1876, (when defendant as aforesaid, put in his plea of set-off in said Court of Common Pleas) as principal, interest, and discount on *various other* loans made by plaintiff. That R. S. Long was a principal debtor upon the original of the note in suit and its several renewals, and was so known to the plaintiff. The defendant is, therefore, entitled to credit in this suit for said sum of $3,241.10 so illegally taken and received by the plaintiff from said Long.—(*Printed Record, page* 17.)

V. The Court below errred in overruling the plaintiff in error's affidavits of defense, in sustaining the demurrer thereto, and in making absolute the Rule for judgment for want of a sufficient affidavit of defense.—(*See Printed Record, pages* 1 22 *and* 23.)

VI. The Court below erred in directing and causing judgment to be entered in favor of the defendant in error and against the plaintiff in error, for the full amount of the note in suit and interest thereon from its due date (Nov. 7, 1874) to the date of the judgment, (May 27, 1879), and protest fees, thus making an aggregate judgment of $13,458.10 against the plaintiff in error.—(*See Printed Record, pages* 22 *and* 23.

P. A. KNOX,

COUNSEL FOR PLAINTIFF IN ERROR.

Argument and Authorities.

All the errors alleged and complained of are shown *by the record* from the Court below, and will be considered here without a formal bill of exceptions. Appearing upon the face of the record, and being "set out separately and particularly" in the Specifications of Error, they are, under the rulings of this Court, entitled to consideration.

Errors that are patent upon the record, are open to revision here, without any motion in arrest of judgment, or exception taken in the Court below.

Bennett v. Butterworth, 11 How., 669.
Garland v. Davis, 4 How., 131.
Slacum v. Pomery, 6 Cranch, 221.
Balt. & Pot. R. R. Co. v. Trustees, Etc., 1 Otto, 130.
Supervisors v. Kennicott, 13 Otto, 556-557.

Mr. Justice WASHINGTON in delivering the opinion of the Supreme Court in *Macker's Heirs v. Thomas*, 7 Wheaton, 532, said:

"It is objected, in the last place, that if the plaintiffs have a right to prosecute this writ of error, they nevertheless cannot assign for error the order of the Court reviving the suit, because they failed in that Court to appear and except to the opinion of the Court in relation to the order. But an exception to the opinion of the Court is only necessary when the alleged error could not otherwise appear upon the record."

Because of the erroneous order in that case, which was only shown by the record and not excepted to, the judgment of the Court below was *reversed* and *annulled* and the suit therein *abated* by the Supreme Court.

In *Graham* v. *Bayne*, 18 How., 60, the rule was held by the

Supreme Court to be, "*That when error does not appear on the face of the record, or on a demurrer*, a bill of exceptions is the only mode of bringing a case before it for review."

The case of *Barnet* v. *National Bank*, 8 Otto, 555, was considered by this Court, although there was no exception in the record—the court below having sustained a demurrer to an affidavit of defense. Mr. Justice SWAYNE, in delivering the opinion of the Supreme Court in that case says, on page 557:

"The bank demurred to the several defences set up by the assignees. To the first and third the demurrer was sustained, and overruled as to the second. Upon the latter the plaintiff took issue, and the case was tried by a jury. The jury rendered a verdict in favor of the bank for $4,080.31, and judgment was given accordingly. It does not appear that anything done by the Court touching this trial was objected to by the plaintiffs in error. *There is no bill of exceptions in the record.*

But one point has been insisted upon by the plaintiffs in error in this Court, and it is that the Circuit Court erred *in sustaining the demurrers to their first and third defenses. That is the only subject before us for examination.*"

In the Supreme Court of Pennsylvania, any error appearing upon the record willl be considered without an exception—WOODWARD, C. J., in delivering the opinion of that Court in *Wheeler v. Winn*, 53 Penn. St., 129, says:

"The old practice was not dispensed with but only added to, and now we have, 1st, the bill of exceptions given by the Statute of Edward; * * * 2nd, the whole charge filed under the Act of 1806, and the Act of 15th of April, 1856. * * * 3rd, Points and answers written out and filed, is another Statutory method of bringing the law of the case upon the record without a bill of exceptions.

And as in either of these modes the matter to be reviewed is brought *upon the record*, and the writ of error which goes to

the whole record, brings it necessarily into the Court of error, counsel may come here and assign errors upon any part of that record, and it is our duty to notice them. * * * That no exception appears of record is immaterial."

The above decision in *Wheeler v. Winn*, 53 Penn St., 129, was afterwards cited and approved by the Supreme Court of Pa., in *Pennsylvania Railroad Co. v. Berry*, 68 Penn. St., p. 279.

Other citations on this point are deemed unnecessary.

Do the affidavits of defense in this case constitute a part of the record?

After *demurring to and admitting* all the facts stated in said affidavits of defense, and after persuading the Court below to sustain its demurrer and make absolute its rule for judgment for want of a sufficient affidavit of defense, the defendant in error will not now be permitted to say that said affidavits of defense do not constitute a part of the record. *The bank, by its own acts, has made them a part of the record*, if they were not such before, and has thereby obtained the erroneous order and judgment of which we complain.

Balt. & Pot. R. R. Co. v. Trustees, Etc., 1 Otto, 127.
Barnet v. National Bank, 8 Otto, 557.

I.

AS TO THE JURISDICTION OF THE U. S. CIRCUIT COURT.

In the Court below, the counsel for the bank relied on Stanton et. al. v. Embrey, Admr., 3 Otto, 548; Smith v. Lathrop, 44 Penn St., 326; White v. Whitman, 1 Curtis 494; Bowne v. Joy, 9 Johns. 221; Wadleigh v. Veasie, 3 Sumn. 167, and other similar cases.

But these cases, so far as we have had an opportunity to examine them, are not in point, and do not decide the question of jurisdiction raised here.

The decision in Stanton v. Embrey Admr., 3 Otto, 548, is stated in the 2d paragraph of the syllabus thus: "2. The

pendency of a prior suit in a *State* court is not a bar to a suit in a Circuit Court of the United States, or in the Supreme Court of the District of Columbia, by the same plaintiff against the same defendant for the same cause of action."

It will be observed that this decision by the Supreme Court was made in a suit begun in the Supreme Court of the District of Columbia in which "the defendants pleaded in abatement the pendency of a suit against them, by the same plaintiff and for the same cause of action, *in the State of Connecticut*; to which plea the plaintiff demurred. The Court sustained the demurrer," &c.—p. 549-553.

The former suit pleaded was not in a Court of the same district or State. It was not in a *domestic* tribunal, but in a *foreign* one, according to decisions relied upon by the bank. Here, the prior suit pleaded was not only in *a Court of the same State* in which the U. S. Circuit Court was held, but in the *same district* over which it had jurisdiction. It was clearly in a *domestic* Court and both suits were in Courts of the same State, which had *concurrent jurisdiction* of such cases and, as to each other, were not in any sense, *foreign* tribunals.

Com. v. Pittsburg & Connellsville R. R. Co., 58 Penn. St., 43-44.
Claflin v. Houseman, 3 Otto, 136–139.
Insurance Co. v. Brune's Assignee, 6 Otto, 592, bottom.
In Ex parte Schollenberger, 6 Otto, 377.
Blake v. Alabama & Chattanooga R. R. Co, 6 Bank. Reg., 332.
Smith v. McIver, 9 Wheaton, 535.
Mollan v. Torrance, 9 Wheaton, 539.
Shelby v. Bacon, 10 Howard, 68.
Brooks v. Mills County, Law and Eq. Reporter, vol. 1, p. 25.
Owens v. Gotzian, 4 Dillon, 436.

The case of *Smith v. Lathrop*, 44, Penn. St., 326, which was very much relied upon by the bank's counsel, simply decides, as per the 2nd paragraph of the Syllabus, that:

"The plea of *lis pendens* IN ANOTHER STATE, is not a defense to a suit between the same parties, for the same cause of action, at the same time, in Pennsylvania."

This case arose in the District Court of Philadelphia, and the prior suit pleaded was an action for the same cause, "in the City of New York." Hence, the case is not in point here.

The case of *Bowne & Seymour v. Joy*, 9 Johns., 221, was an action in a New York Court. "The defendant pleaded another action brought by the plaintiffs against the defendant, for the same cause, in the Court of Common Pleas of the County of Bristol, in the State of Massachusetts." Hence, that case does not apply here.

The U. S. Circuit Court for the Western District of Pennsylvania and the Court of Common Pleas of Greene County, Pa., are both Courts of and *within* the State of Pennsylvania, and are both governed and controlled by the laws of said State, except where the Constitution and laws of the United States expressly direct otherwise. Being Courts of and within the same State, and alike subject to its laws, except as aforesaid, they are, as to each other, *domestic* tribunals, both having and exercising jurisdiction and powers conferred by the Constitution and laws of said State and of the United States.

Judge SHARSWOOD, in delivering the opinion of the Supreme Court of Pennsylvania, in *Commonwealth v. Pittsburg & Connellsville Railroad Co.*, 58 Penn St., on pages 43 and 44, says:

"The Circuit Court of the United States is not the court of another soverign. The Federal Constitution is the Constitution of this State, having been ratified and adopted by the sovereign act of the people in convention, December 12, 1787. They made it irrevocably their own by their entering into a solemn compact with the people of their sister States—binding them for all time—unalterably in any other mode than that pointed out by its own terms. The able and eminent first Chief Justice

of this Court, in clear and emphatic language, declared, at a very early day, this fundamental truth of our political system: 'The Government of the United States," said McKean, C. J., "forms a part of the government of each State:" Respublica v. Cobbett, 3 Dall. 473. *It follows that its courts are the courts of each State;* they administer justice according to the laws of the State as construed and settled by its own supreme tribunal. This has been more than once solemnly determined by the Supreme Court of the Union to be the rule of their decision, whenever the Constitution of the United States, treaties or Acts of Congress do not come in question: Shelby v. Guy, 11 Wheat. 361; United States v. Morrison, 4 Pet. 124; Green v. Neal, 6 Id. 291; Leffingwell v Warren, 2 Black 599."

MR. JUSTICE BRADLEY, in delivering the opinion of the Supreme Court in Claflin v, Houseman. Assignee, 6 Otto, page 136, says: "The general question, whether State Courts can exercise concurrent jurisdiction with the Federal Courts in cases arising under the Constitution, laws and treaties of the United States, has been elaborately discussed, both on the bench and in published treatises,—sometimes with a leaning in one direction and sometimes in the other,— but the result of those discussions has, in our judgment, been, as seen in the above cases, to affirm the jurisdiction, where it is not excluded by express provision, or by incompatibility in its exercise arising from the nature of the particular case.

When we consider the structure and true relations of the Federal and State Governments, there is really no just foundation for excluding the State Courts from all such jurisdiction.

The laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are. The United States is not a foreign sovereignty as regards the several States, but is a concurrent, and, within its jurisdiction, paramount sovereignty. Every citizen

of a State is a subject of two distinct sovereignties, *having concurrent jurisdiction in the States*—concurrent as to place and persons, though distinct as to subject matter. Legal or equitable rights, *acquired under either system of laws*, may be enforced *in any court of either sovereignty* competent to hear and determine such kind of rights and not restrained by its constitution in the exercise of such jurisdiction."

In *ex parte* SCHOLLENBERGER, 6 Otto. 369, the syllabus states that, "Suit was brought in the Circuit of the United States for the Eastern District of Pennsylvania, by a citizen of that State against the company (a foreign insurance company), and process served in accordance with the *State law*, upon its agent so specified, who resided within the district. The service of the process was quashed, because the company was not an inhabitant of or found within the district. *Held*, 1. That the Circuit Court has jurisdiction of the suit, and should proceed to hear and determine it. 2. *That said court is a court of the Commonwealth, within the intent of the statute.*"

In the 8th Circ. (Minn.), in case of *Owens* v. *Gotzian*, 4 Dill. 436, it was held that: "In the Federal Courts sitting within any State, a judgment of either of the courts of the State, is to be deemed a *domestic*, not a *foreign* judgment."

In *Brooks* v. *Mills County*, Law and Eq. Reporter, Vol. 1, page 25, it was held, by the U. S. Circuit Court of Iowa, that: "An action in a State Court can be pleaded in abatement of an action in a Federal Court in the same district."

The U. S. Circuit Court below, being under decisions, both State and Federal, a court *of* and *within* the State of Pennsylvania, it follows that said U. S. Circuit Court and the Court of Common Pleas of Greene county, Pa., in which this suit was first brought, are courts of the *same* State and *domestic* tribunals as to each other. And Mr. Justice STRONG, in delivering the opinion of this Court in *Insurance Co.* v. *Brune's Assignee*, 6 Otto, near bottom of page 592, states the law thus:

"At law, the pendency of a former action between the same parties for the same cause is pleadable in abatement to a second action, because the latter is regarded as vexatious. But the former action must be in a domestic court; that is, in a court of the State in which the second action has been brought."

The former action pleaded here was not only in a court of the same State and in a domestic tribunal, but in one having *concurrent* jurisdiction. In the beginning, the bank had the undoubted right to sue the plaintiff in error in either court, and it elected to sue in the Common Pleas. Sec. 5136, Revised Statutes, empowers national banks: "Fourth. To sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons."

Mr. Justice McLEAN, in delivering the opinion of the Supreme Court, in *Shelby v Bacon*, 10 How., 68, said:

"There is no principle better settled than that, when two or more tribunals have concurrent jurisdiction over the same subject matter and the parties, a suit commenced in any one of them, may be pleaded in abatement to an action for the same cause in any other."

Mr. Chief Justice MARSHALL, in delivering the opinion of this Court in Smith v. M'Iver, 9 Wheat, 535, said:

"In all cases of *concurrent jurisdiction, the court which first has possession of the subject, must decide it.*"

Mr. Justice WOODS, in delivering the opinion of the U. S. Circuit Court of Alabama, in *Blake v The Alabama & Chaitanooga R. R. Co. et al.*, 6 Bank. Reg. 332, said:

"The State Court had jurisdiction of the subject matter of the suit before it and of the parties. Its jurisdiction was first invoked and asserted. It is too well settled to need citations of many authorities that as between courts of concurrent jurisdiction that which first acts is entitled to exercise its jurisdiction to the exclusion of the others. The Courts of the United

States and those of a State have concurrent jurisdiction in many cases, but when persons or property are liable to seizure or arrest by the process of both, that which first attached is entitled to the preference." And he cited: *Ex parte Jenkins*, 2 Wall Jr 521; *Smith v. M'Iver*, 9 Wheat., 532; *Shelby v. Bacon*, 10 How., 56; *Taylor* v. *Carryl*, 24 How., 583; *Mallet v. Dexter*, 1 Curt. 178; *The Robert Fulton*, 1 Pa., 621; *Ex parte Robinson*, 6 McLean, 355."

In *Ward v Todd*, 13 Otto. 327, it is held that: "A court which has once rightfully obtained jurisdiction of the parties may retain it until complete relief is afforded within the general scope of the subject matter of the suit."

In the 7th Cir. (Ill.), it was held that: Jurisdiction of national courts over suits by or against national banks, is not exclusive, but concurrent with state courts." *Pettilon v Noble*, 7 Biss. 449.

Mr. Justice BRADLEY, in delivering the opinion of this Court n *Claflin v. Houseman, Assignee*, 3 Otto, on page 137, further said:

"The fact that a state court derives its existance and functions from the state laws is no reason why it should not afford relief; because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the State as it is to recognize the State laws. The two together form one system of jurisprudence which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent."

It will be urged however that the affidavits of defense show that the prior suit in the Common Pleas, for the same cause of action, had been discontinued by the bank before the bringing of this suit in the U. S. Circuit Court.

But we submit that, under *all the facts admitted* by the bank's *demurrer* and set forth in the affidavits of defense and in Specification in Error No. 1, there was no proper or legal discontinuance of the said prior suit, between the same parties and sor the same cause of action, in the Courts of Common Pleas of Greene county, Pa. We further hold that no court of justice would evor permit the discontinuance of a suit, properly before it, under the facts and circumstances detailed in said affidavits and specification.

The law upon this subject is so fully and clearly stated by Judge SMITH, in delivering the opinion of the Supreme Court of Pennsylvania, in the case of *The Mechanics' Bank* of the city and county of Philadelphia v. *Fisher*, 1 Rawle, 341, that we quote from that opinion (on pages 346–348) as follows:

"The right of a party to discontinue his suit under proper restrictions is not denied; indeed, generally speaking, it is the right of the party, but is not always a matter of course, for the plaintiff will not be permitted to discontinue where he will gain an advantage by it; nor will he be indulged in doing so, if prejudicial to his opponent, or when leading to vexation or oppression.

In England, in the King's Bench and Common Pleas, it is generally done by obtaining a side bar rule "for leave to discontinue the action upon the payment of costs." But from the case of *Belchier* v. *Gansell*, reported in 4 Burr. 2502, not cited at the bar, it is clear that the rule to discontinue will not be granted if it be intended to oppress the defendant by another suit. To me, it appears the case of Belchier v. Gansell, if not exactly the same as the one before us, is very analogous to it. In that case, a discontinuance had been entered on a side bar rule, and then the plaintiff arrested the defendant again on the very same bonds, only laying the new suit in Middlesex instead of London; but, on motion, the discontiu-

ance was set aside on the ground that it was a trick, and an unwarrantable conduct in the attorney, and that it ought not to have the intended effect.

In this country, in our own courts, the law is established in the same way. In *Pollock* v. *Hall*, 3 Yeates, 42, Chief Justice Shippen says, discontinuances are the acts of the Court, and subject to their discretion. And in *Broom* v. *Fox*, 2 Yeates, 531, the Court say, "Regularly, there can be no discontinuance without leave of the Court," In addition to these cases, there are others which, by a parity of reason, bear on the present case. In *Wikoff* v. *Perot*, 1 Yeates, 38, and *Jackson* v. *Winchester*, 2 Yeates, 529, it is decided, that the defendant cannot withdraw his plea, at the time of trial, to give him the benefit of the conclusion to the jury, without the leave of the court; or, wherever trouble or expense has been incurred by any plea of the defendant's, the court will not give leave to retract the plea So, in *McCullough* v. *McCullough*, 1 Binn. 214, after an inquest has returned, that the rents and profits will pay in seven years, the plaintiff cannot discontinue his *fieri facias*, and take out a new one, without leave of the court.

I take the result of this doctrine to be, that courts will protect their suitors from vexation, oppression, or an undue advantage, and will not suffer either party to do any act which may have this tendency. In this case, the advantage the plaintiffs proposed to themselves, must be obvious to all, for by discontinuing the suit in Danphin county, where the defendant was at home, and by suing him immeniately for the same cause of action in Philadelphia, where the plaintiffs resided, they would of course, get rid of some inconvenience, expense and trouble; to all of which the defendant would necessarily be exposed, if compelled to attend at Philadelphia. I would then ask, was this not a contrivance, or an attempt on the part of the plaintiffs, not only to gain an advantage over their oppo

nent, but was it not, also, calculated to vex, and oppress, and expose him to unnecessary expense and inconvenience? Whenever, therefore, it appears that a party discontinues one suit, for the purpose, merely, of instituting another for the same cause of action elsewhere, the court, on motion, will set aside the discontinuance, and re-instate the former suit, and subject the party to the consequences of his own acts. Here the plaintiffs had chosen the place and the tribunal where, and before which, to sue their debtor; having done so, the defendant, on his part, as he had a right, moved in the suit, and filed his determination of record to have the suit decided by arbitrators, of which he noticed the plaintiffs; but, before he had returned home from this service, the plaintiffs gave directions to discontinue their suit; it was discontinued by one not authorized, and without the permission of the court. Under these circumstances, I am not disposed to favour the discontinuance of a suit; * * * * * * *

"Upon the whole, then, this court is of opinion, that where it appears a discontinuance is entered with a view to vex and oppress a defendant, by suing him elsewhere for the same cause of action, and the party, under such circumstances, applies to the court to sanction the discontinuance of the suit, and set aside all subsequent proceedings in the cause, the application should not succeed unless founded in justice and equity; and not, as in the present case, where an advantage is the obvious and necessary consequence to the plaintiffs, and great expense, besides inconvenience, to the defendant. The judgment is, therefore, to be reversed, and the award to stand. Judgment reversed."

In *Pollock* v. *Hall*, 4 Dall., 222, it is said BY THE COURT, on pages 223 and 224, that: "The case of *Sterret v. Chambers et. al.*, induced us to pause, before we decided the point now submitted to our consideration. It does not appear, however,

that the right to discontinue was at all contested in that case; and the other cases, cited from our records, do not import any judicial decision, that would be binding upon us, as authority, on the present occasion.

In this situation, we think we are at liberty to deny the right for which the plaintiff contends; and that the policy of the Legislature, as well as the principles of justice, will sanction the denial. The act of assembly sought to compose strifes, to shorten litigation, by assigning an amicable tribunal, to which the parties might voluntarily resort: and when both have agreed to resort to that tribunal, it would be inconsistent with the general nature of an agreement, to permit one of them alone to withdraw from its jurisdiction. Feuds would be inflamed, instead of being allayed; and suits multiplied instead of being diminished, by such a construction of the law."

The cases of *Schuylkill Bank* v. *Macalester*, and *Same Bk.* v. *Wager*, 6 Watts and Serg., 147, were actions of debt on two bonds for $10,000 each, in which Macalester and Wager were sureties. The defendants entered a rule of reference. On the morning of the day fixed for the appointment of arbitrators, and before they were appointed, the plaintiffs *filed a discontinuance and paid the costs* in each suit. When, however, arbitrators were appointed, as provided by the State law, and were about to proceed, a rule was taken by the plaintiffs to show cause why the appointment of arbitrators and the subsequent proceedings should not be set aside. In deciding these cases, the Supreme Court of Pa. says (6 W. and S., pp 149) that:

"A right which can be exercised only by permission, is no right at all; *and all the cases show that a discontinuance must be founded on the express or implied leave of the court.* In England this leave is obtained on motion, in the first instance;

and here it is taken without the formality of an application, but subject to be withdrawn on cause shown for it; that is the whole difference. *The act, when the propriety of it is contested, must, in the one shape or the other, have the sanction of the court.*"

After detailing the circumstances, the Supreme Court further says: "The plaintiff is, therefore, bound either to enter a *retraxit*, which would make an end of their (the sureties') legal liability, or proceed to judgment." And the Rules were discharged and discontinuance set aside.

LOWRIE, J., afterwards Chief Justice of Pa., said in deciding the case of *Cooper* v. *Cooper*, 1 Phila. 129, that: "A discontinuance is not a matter of course, as a general rule, but is entered on leave of Court."

HARE, P. J. in *Kennedy* v. *McNickle*, 7 Phila,, 217, says: "A discontinuance does not, like a retraxit, operate as an extinguishment of the cause of action, but leaves the plaintiff free to bring another suit. *It will not, therefore, be allowed when the effect is to deprive the defendant of an advantage which he is entitled to retain.*" And he cites *Mechanics' Bank* v. *Fisher*, 1 Rawle, 331-347, already referred to.

And on page 218, he further says: "It is accordingly settled by a uniform practice, from which there has been no variation, either in the English Courts or our own, that the plaintiff cannot withdraw from the suit except on terms that will amount to a perpetual bar, after it has been brought to a point where injury would or might result to the defendant if the withdrawal were permitted." And he refers to Tidd's Practice, 679; Archbold's Chitty's Practice, 208.

In *Davis* v. *Sharpe*, 5 Weekly Notes of Cases, 404, the COURT (Phila. C. P.) says: "In order to discontinue a case, leave of the Court must first be had or obtained."

A party will not be allowed to discontinue, where it will put

his opponent to inconveniences and expense. *Payne v. Grant*, 7 W. N. C. 406.

Brooks v. Prentzell, 10 W. N. C. 319, is to the same effect.

In *Summy v. Hiestand*, 65 Penn. St. 300, the Supreme Court of Pa. decide that:

"Without payment of costs a suit cannot be discontinued."

By the above authorities, it is shown, that from 4 Dallas down to the present, the Supreme and other courts in Pennsylvania have always held that the discontinuance of an action pending in a Court of that State, must be by *leave of the Court* and on *payment* of the *costs* accrued, unless the plaintiff and defendant both assent to such discontinuance.

It may be urged that the record shows that the costs of the prior suit in the Common Pleas were paid because there has been sent up with it from the court below a copy of what purports to be a receipt from the Prothonotary of Greene county, Pa., for the costs in said prior suit.—(*Printed Record, pages* 19 *and* 20.)

This paper does not properly constitute any part of the record—never having been filed by leave of the Court. It appears to have been simply taken to the Clerk's office and marked, "filed April 30, 1879." It is dated April 28, 1879. This was not only subsequent to the bringing of this suit in the U. S. Circuit Court on April 2d, 1879, but was four days after the plaintiff in error had sworn to and filed, in said U. S. Circuit Court, his affidavit of defense, stating that the costs in said prior suit in the Common Pleas had not been paid, and urging that fact as one ground of his defense to the suit in the court below.—(*See Printed Record, pages* 1, 15 *and* 19.)

Being dated and filed subsequent to the bank's rule for judgment for want of a sufficient affidavit of defense and reasons therefor, (*Printed Record, page* 1), it can affect no one but the bank and its demurrer, and would seem to be an admission

that the prior suit had not been properly discontinued before the bringing of the present one.

But, as Mr. Chief Justice MARSHALL stated in the opinion of this court, in *Mollan* v. *Torrance*, 9 Wheat. 539, that: "It is quite clear that the jurisdiction of the Court depends upon the state of things at the time of the action brought, and that after vesting, it cannot be ousted by subsequent events," nothing further need be said here in regard to the alleged payment of costs by the bank after this suit was brought and the plaintiff in error's affidavit of defense had been filed.

The bank, by its demurrer, having admitted that the prior suit in the Common Pleas was between the same parties and for the same cause of action; that it was at issue, and had been tried in the Common Pleas; had then been taken to the Supreme Court and the judgment reversed; had been sent back for re-trial in the Common Pleas, and put at the head of the list for April Term, 1879; that it was marked discontinued by the bank's attorneys, without the knowledge or consent of the plaintiff in error, without any leave from said Court of Common Pleas and without the costs in said prior suit being paid; that the plaintiff in error had never assented to such discontinuance; that no leave therefor from said Court of Common Pleas had been obtained, and that the costs had not been paid; that the bank had attempted such discontinuance, and brought the present suit for the purpose of vexing and oppressing the plaintiff in error, and causing him to litigate the case at a great distance from his home and the homes of his witnesses, and at greatly increased cost, trouble and expense; that he had been put to and would be put to great additional and unnecessary expense which he could not recover from said bank; that the bank had attempted such discontinuance and brought the present suit for the purpose of preventing, *in this case*, a final determination by the Supreme Court of

Pennsylvania of the question whether there were in said State, certain State banks of issue authorized, by the laws of said State, to take, receive, reserve and charge upon their loans and discounts,interest at the rate of nine (9) per cent. per annum,or at such rate as might beagreed upon between the borrower and such alleged banks of issue, and all the other facts and circumstances set forth in said affidavits of defense, and shown by the 1st Specification of Error; we submit that the facts, so admitted by the bank, show beyond all question that the Court below had no proper or legal jurisdiction over this suit.

But it may be said that the affidavits of defense are informal and did not properly set forth and exhibit the facts to the Court below.

If so, we refer to the late case of *McPherson* v. *Allegheny National Bank*, 96 Penn. St. page 139, where the law as to the requisites of an affidavit of defense in Pennsylvania is stated by the Supreme Court of that State in an opinion delivered by Mr. Justice GREEN. Near the close of the opinion (p.139) he says:

"How then, in the face of the defendant's denial, can any judgment be rendered against him on the present state of the record? It is sufficient if an affidavit of defence sets forth facts showing a substantial *prima facie* defence, which can probably be established. It is not necessary for the defendant to meet by his oath every objection or argument against his case which fine critical skill may deduce: Leibersperger v. The Reading Savings Bank, 6 Casey 531. An affidavit of defence is sufficient, if it set forth in words or by necessary inference therefrom, the indispensable elements of a good defence: Selden v. Neemes, 7 Wright 421. An affidavit which puts the plaintiff upon proof of any matter *dehors* the instrument sued on, is sufficient to prevent judgment: Hunter v. Reilly, 12 Casey 509. We are clearly of opinion that the affidavit of defence was sufficient to put the plaintiff to proof, and that there

was error in entering judgment against the defendant. Judgment reversed"

To show that the facts relied upon by the plaintiff in error were sufficient and sufficiently stated in his affidavits of defense in the Court below to prevent judgment, we need only add the words of Mr. Chief Justice WAITE, in delivering the opinion of the Supreme Court in *Atlantic & Pacific R. R. Co.* v. *Hopkins*, 4 Otto. p. 13, that:

"As the practice in the courts of the United States must conform as near as may be to that in the courts of the States, Rev. Stat., Sect. 914, these decisions construing the practice acts of the State are binding upon the courts of the United States."

II.

As to whether the bank took, received, reserved, or charged usurious interest, and the effect of so doing.

Sections 5197, and 5198 Rev. Stat., are as follows:

"Any association may take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory or district where the bank is located, and no more, except that where by the laws of any State a different rate is limited for banks of issue, organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this title. When no rate is fixed by the laws of the State, or Territory or district, the bank may take, receive, reserve, or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. And the purchase, discount, or sale of a bona-fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at no more than the current rate of exchange for sight drafts in addition

to the interest, shall not be considered as taking or receiving a greater rate of interest.

SEC. 5198. The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same; provided such action is commenced within two years from the time the usurious transaction occurred."

Since this case was argued and decided in the Court below, the Supreme Court of Pennsylvania has finally decided in the case of *Lebanon National Bank* v. *Karmany*, 98 Penn. St., 65, that:

"*There are no banks of issue in Pennsylvania authorized to receive interest at a higher rate than six per cent.*"

Mr. Justice Trunkey, in delivering the opinion of the Supreme Court of Pa., in that case, on page 73, says:

"The defendant asked instructions that the banks named in the special plea are banks of issue, under the laws of this Commonwealth, within the meaning of section 5197 of the R. S. U. S., to which the court answered: "It does not appear that the banks named are banks of issue, having the right to charge a rate of interest greater than six per cent. per annum. And in fact, and in law, there is no bank of issue in Pa. authorized to charge a rate of interest in excess of the legal rate." This ruling was in accord with the opinion of Agnew, C. J., in First Nat. Bank of Clarion v. Gruber, 6 Nor. 468, and with the subsequent decision of this court in the same: 8 W. N. C. 119. At the sec-

ond trial nearly all the same charters were pleaded as in this case. It is not alleged that these banks ever did issue circulating notes. It was not the legislative intent that they should have that right. Until their charters were construed to give it by national banks, it was not suspected that such power had been granted."

In the same opinion, on page 74, it is further said: "In answer to the defendant's twelfth and thirteenth points, the jury were instructed that nothing in the statutes of this Commonwealth, relating to the rate of interest, authorizes banks to take, receive or charge a rate of interest in excess of six per centum per annum." And this instruction was affirmed by the Supreme Court in these words: "The court was clearly right as to the instruction as to the rate of interest banks may receive or charge on loans and discounts." Among the charters before the Court for construction in that case as to whether the banks created thereby were banks of issue, were those of the four banks claimed by the defendant in error in this case to be banks of issue; to-wit: The Franklin Bank of the city of Philadelphia, The United States Banking Company, The People's Bank of the city of Philadelphia, and The Butchers' & Drovers' Bank of Philadelphia, (See *Lebanon National Bank* v. *Karmany*, 98 Penn. St., p. 67.)

The decision in that case, and those cited in the opinion, conclusively settle, as we think, this much debated question. As to the rate of interest in Pennsylvania, the Supreme Court further say, in the above case, on page 74: "In absence of a contract for a less rate, the plain letter of the statute is, six per centum per annum is the lawful rate of interest, and if the parties contract for a greater rate the contract is voidable as to the excess; the debtor need not pay the excess, and if he pays the excess voluntarily, he may recover it back by action."

The Supreme Court of Pa. has since decided said questions

the same way: Columbia Nat. Bank v. Bletz; Pitts. L. J., vol. 13 N. S., p. 489.

It being admitted, then, that the defendant in error knowingly took, received, reserved and charged upon the loan and each of its renewals, represented by the note in suit, interest at the rate of nine (9) per cent. per annum, the interest so taken aggregating $2,736.50, (see affidavit of defense, printed record, p. 17, par. 5, and specification in error No. 2), and it being clear that such rate of interest was in excess of that allowed by law to national banks located and doing business in Pennsylvania, what is the effect of such a violation of the law upon the parties to this suit?

In *Farmers', etc., National Bank v. Dearing*, 1 Otto. 29, this Court held (see p. 37) that: "The plaintiff below was entitled to recover the principal of the note sued upon, LESS THE AMOUNT OF THE INTEREST UNLAWFULLY RESERVED."

We claim that the renewals of the original note were merely an extension of the time of payment; and that they and the original note only marked the period of the loan, just as one note, taken for the whole period, would have done. If but one note had been taken for the whole period of the loan, and the said sum of $2,036.00 had been reserved, or charged, as the interest for that period, it is clear that all of said sum would have been forfeited. What difference should it make that the bank violated the law by piecemeal? Should a single violation of the law be condemned, and then cured by repeated violations thereafter?

It has been held that, "Notes are but the evidence of a debt, and the holder may surrender them and recover on the original consideration at his option. They are presumptively but an extension of the time of payment. Cole v. Sacket, 1 Hill, 516; The Kimball, 3 Wallace, 37;" in re Perkins, 10 N. B R., 534. Now, surely this illegal discount and interest as it was taken

by the bank, was embraced in and made part of every subsequent note. *Campbell v. Sloan*, 62 Penn. St., 484—486; *Overholt v. National Bk. of Mt. Pleasant*, 82 Penn. St., 493—495; *Earnest v. Hoskins*, 100 Penn. St., 559—560; *Walker v. Bank of Washington*, 3 How., 62.

Said illegal discount and interest was, therefore, in the note in suit. Why then should not the defendant be allowed to have the same deducted?

To show that the notes themselves "carried with them the principal loaned and the interest agreed to be paid," we refer to the Receiver of the Ocean National Bank v. Wild, 10 N. B. R., 578, where Woodruff, Cir. J., says: "It follows that the transaction in question was within the prohibition of the National Banking Law, and the bank, *eo instanti*, it made the loan upon the terms exacted, incurred the forfeiture of the entire interest which the notes received carried with them, or which was agreed to be paid thereon. Discounting the notes did not render it less true that the notes themselves carried with them the principal loaned and the interest agreed to be paid, which, with the bonds also given, necessarily included all the pecuniary benefit agreed to be paid as compensation for the loan, whatever form the transaction was made colorably to assume.

The bankrupt, as mere accommodation indorser, or surety, is, upon familiar principles of equity, entitled to all the protection which his principal (the Canal Company) would have if the notes in question were sought to be enforced against it. I do not say that he can recover back money paid by the Canal Company, but he has a right to inquire whether, in view of the forfeiture of the entire interest by the bank, there is anything due to the bank upon the notes which he indorsed, and thereby to ascertain whether and to what extent the notes now in question are without consideration."

It will be said that our views are in conflict with the deci-

sions of this Court in *Barnet v. National Bank*, 98 U. S. 555; and *Driesbach v. National Bank*, 104 U. S., 52.

We contend that, even if these cases last named are adhered to, they should only be made to apply to cases presenting the same state of facts, and that they are clearly distinguishable from this case of Stephens v. the Monongahela National Bank.

In those cases the principal debtors, who were *the parties who had paid the usurious interest*, and their assignees under a deed of assignment for benefit of creditors, were the defendants. The defendants having *paid* the usurious interest, had the right to sue for and recover back twice the interest so paid. Under the statute, it is only the party paying who can recover the penalty of twice the interest paid. No other party to the note can recover this penalty. In this case Azariah Stephens, the accommodation indorser, or surety, who was so known to the bank and who never paid any interest or discount to the bank on the loan or any of its renewals, is the defendant. He has no right to sue for or recover the penalty of twice the interest, and hence cannot be restricted to that mode of punishing the bank. But a large amount of usurious interest has been paid on the loan, or taken by the bank from the principal debtor. Why can't the plaintiff in error set up the forfeiture of the entire interest and discount, whether incurred by the bank by either its taking, receiving, reserving, or charging usurious interest on the loan and its renewals? He can have no other defence on account of the usury taken, if he is at all liable on the note in suit. As a matter of fact, this will not result in two forfeitures, or penalties, to the bank, for the day has gone by for the principal debtor to sue for the penalty. But does not the statute provide for a forfeiture of the *entire interest*, which is one thing, and for a penalty, *twice the amount of interest*, which is another thing? Why, by construction, eliminate the express forfeiture declared in the statute, except

in the one case where there is a mere stipulation to pay usury without anything being paid or taken?

The statute distinctly declares a forfeiture against National Banks in either of four cases, viz: in either (1) the taking; (2) receiving; (3) reserving; or (4) charging more than the lawful interest. Certainly the taking or receiving usury is more than a mere stipulation to take it. It cannot be taken or received on a loan without being passed over or transferred by some device, from one party to another, and that is payment. Hence for a payment of usury a forfeiture is declared of the *entire interest* in behalf of all parties on the note, as well as a suit for double the *entire* interest in favor of the party who actually paid the usury.

This Court held in *Bank of the U. S.* v. *Owens*, 2 Peters., pp. 537, that: "A profit made or *loss imposed* on the necessities of the borrower, whatever form, shape, or disguise it may assume, where the treaty is for a loan and the capital is to be returned at all events, has always been adjudged to be so much *profit taken* upon a loan, and to be a violation of those laws which limit the lender to a specified rate of interest." And this language was quoted with approval in the opinion of this Court in *Hotel Co.*, v. *Wade*, 97 U. S pp. 23.

It would seem, therefore, that reserving interest or discount at the inception of a loan is more than a mere stipulation to pay, and that it amounts to a payment by the borrower. We most respectfully suggest that to hold that there is no forfeiture of the entire interest except in case of a mere stipulation to pay, seems to us, to ignore the terms, "taking," "receiving" and "reserving" in the statute to a certain extent.

The party suing for twice the interest don't sue for or recover the *interest* he has paid. He recovers a *specific penalty*, the amount of which is double the amount of interest taken.

Again, in *Barnet* v. *National Bank*, 98 U. S. 555, the 2d de-

fense in which the defendants claimed to set off the entire discount and interest charged and paid upon the loan and the several renewals thereof represented by the bill in suit, was not before the Supreme Court for review - that defense having been sustained by the Court below. The 3d defense in that case sought to set-off double the amount of interest taken on quite a number of bills. And the 1st defense was a general one, relating to the several series of bills, and not confined exclusively to the particular series of bills of which the one in suit was the last.—(*See Printed Record in Barnet v. National Bank, pages* 25, 26 *and* 27.)

Hence, this case is different from that one as presented to the Supreme Court.

It would be strange, indeed, if an accommodation endorser, or an accommodation maker, known to the bank to be such from the beginning of the loan, who never paid any usurious interest, and didn't know of it being included in the note in suit until after it had been taken by the bank, should be held to be in a worse plight than the principal debtor who paid the usury and knowingly contracted to pay it.

It seems to us that if the defendant is entitled to have deducted the entire interest unlawfully taken when the first note was given, as held in *Farmers' & Mechanics National Bank v. Dearing*, 91 U. S. pp. 37, he should, also, be permitted to show the usurious interest taken upon each subsequent renewal note and have the same deducted, and thus prevent the bank from recovering a second time that which it had no right to take in the first place. The case of Driesbach v. National Bank, 104 U. S. 52, and the question whether the bank was entitled to

recover any interest on the note in suit after it fell due, will be further discussed in the argument.

III.

We claim that the facts shown by Specification in Error No. 3, are sufficient to show that the note in suit is not the contract of the plaintiff in error and that as against him it is void.

Under the facts detailed therein, the law will not presume that he intended to enter into a corrupt and illegal contract, such as is now shown to this Court. Whilst the bank, probably, had the right to draw a renewal note for the sum actually loaned, less the usurious discount and interest reserved and taken thereon, yet it could not, without the knowledge or consent of the plaintiff in error, include or put in the note any usurious discount or interest, reserved or taken by the bank on the loan.

This view seems to be supported in an opinion of this Court, delivered by MR. JUSTICE STORY in *Bank of U. S. v. Waggener*, 9 Peters, 378. It is there said on page 399, that: "It may be proper to remark that, in construing the usury laws, the uniform construction in England has been, (and it is equally applicable here,) that to constitute usury within the prohibitions of the law, there must be an intention knowingly to contract for or to take usurious interest; for if neither party intend it, but act *bona fide* and innocently, the law will not infer a corrupt agreement."

We also refer to Bensinger v. Wren, 100 Penn. St., p. 505 and cases there cited.

IV.

The long affidavit of claim in this case, (printed record pages 2 to 12), was informal as to all statements *dehors* the instrument sued on, except as to the amount of the claim and the bank's title thereto. Imhoff v. Brown, 30 Penn. St., 504.

The affidavits of defense were in proper form, as already

shown, and were certainly sufficient to prevent judgment. We, therefore, think it clear that the Court below erred as set forth in the 1st, 2d, 3d, 5th and 6th Specifications of Error.

P. A. KNOX,
C. E. BOYLE,
for Plaintiff in Error.

111-197

Supreme Court of the United States.

No. 256. October Term, 1883.

BARZILLA STEPHENS.

VS.

THE MONONGAHELA NATIONAL BANK

OF BROWNSVILLE, PA.

Brief and Argument for Defendant in Error.

GEO. SHIRAS, Jr.
KNOX & REED.

Percy F. Smith, Print, 55 Virgin Alley, Pittsburgh.

IN THE

Supreme Court of the United States,

BARZILLA STEVENS,

vs

THE MONONGAHELA NATIONAL BANK, Brownsville, Pa.

No. 256 October Term, 1883.

The first specification of error raises the question of the jurisdiction of the Circuit Court, which is denied, because the Bank had a suit upon the same cause of action which had been pending for some time in the Court of Common Pleas of Greene County, Pennsylvania.

The most complete answer to this proposition is the fact that the Bank had discontinued its action on March 19th, 1879, about twenty days before the bringing of the suit in the Circuit Court. A copy of the record of this discontinuance is found on page 15 of the transcript of the record and is in these words,—"We hereby discontinue this suit. March 19th, 1879." Signed "Sayers & Sayers, Attorneys for Plaintiff." Aside from the question of the sufficiency and effect of this discontinuance, we claim as a matter of law the Circuit Court had jurisdiction of the action. It was held in Stanton vs. Embry, 3 Otto 548. "The pendency of a suit in a State Court by the same plaintiff against the same defendant for the same cause of action, is not a bar to a suit in the Circuit Court of the United States." To the same effect are Smith vs Lathrop, 8 Wright, (Pa.) 326 and White vs. Whitmen, 1 Curtis, Circuit Court, 494. In Lyman vs. Brown, 2 Curtis, Circuit Court, 559, it is

said "The ground of a plea of *lis pendens* I understand to be that the defendant shall not be twice vexed for the same cause of action where the court can see that in each case the remedy is substantially the same. But the Court must be able to see that the remedy *is* substantially the same; and where a *distinct* jurisdiction is sought whose process as to person or property may obtain a satisfaction not within the reach of that in the first suit how can the Court see that the remedy is the same. In Wood vs. Lake, 13 Wisconsin, 103, it is said the rule that a subsequent action is abated by a former one between the same parties for the same cause of action it seems is confined to cases where both actions are pending in Courts of the same State or government"

In Parsons vs. The Railroad Company, 1 Hughes, 279, Chief Justice Waite applied the same rule to a general creditor's bill in a Federal Court of South Carolina where a similar suit was pending in a State Court of that State. In Logan vs Greenlaw, 12 Federal Reporter, page 10, the principle is laid down as follows: "Ordinarily the pendency of another suit between the same parties in an *independent* jurisdiction is no bar or rather does not work an abatement" citing, First: Daniel's Chancery Practice, Fifth Edition, 633 and Notes. "The suitor," it is added, "can have only one satisfaction and pursue as many different remedies in different jurisdictions as he can find applicable to his case" In Wadleigh vs. Veazie, 3 Sumner, 165, the same principle was announced under circumstances identical with the present case, inasmuch as it was a case pending in the State Court, within the territorial jurisdiction of the Federal Court. If the defendant had any ground for his position, he waived it by answering to the merits without saving and reserving to himself the right to answer without waiving.

It is unnecessary to discuss in detail those specificatious of error which raise the question of the right of the Bank to charge a greater rate of interest than 6 per centum per annum; inasmuch as the law as applicable to the facts admitted in the affidavit of defense, in the Court below is now settled by Barnett vs. The National Bank, 98 U. S., and Driesbach vs. The National Bank, 104 U. S. It will be noticed by reference to page 19 of the transcript of the record that all of the alleged usurious interest was *paid* at the time the loans were made and not included in the notes. On page 17 of the transcript of the record, paragraph 5 of the affidavit of defense, the defendant below undertook to give a history of the note in controversy which is as follows:

"That the original of the note in suit was discounted and taken by the plaintiff's Bank on August 27, 1872; the money actually loaned and advanced thereon to Israel Stephens, the maker of the note being $9,545 that said original note and loan was renewed by four subsequent notes, the last being the note in suit. *That upon said loan and each renewal thereof* the plaintiff knowingly *took, received, reserved* and *charged* interest at the rate of 9 per cent. per annum; that the interest so taken aggregated $2,' 36; *that all of said interest was so knowingly taken, received, reserved and charged by the plaintiff Bank*, contrary to law, and defendant is entitled to set off the same against the money loaned on the original note in suit." The defendant below, it will be seen,

sought to do exactly what was claimed in Barnet vs. The National Bank. That is, after having distinctly averred the payment of the usurious interest he sought to apply it by way of offset to the payment of the note in suit. Mr. Chief Justice Waite says in Driesbach vs. The National Bank, the object of the plaintiff in error is to have usurious interest *paid* a National Bank on renewing a series of notes of which those now in suit was the last applied in satisfaction of the principal of the debt. The claim is not for interest stipulated for and not included in the note sued on, but for the application of what has actually been paid as interest to discharge the principal. "This we held in Barnett vs. The National Bank, could not be done."

The questions raised by the third and fifth specifications of error are disposed of in the case of Barzilla Stephens vs. The Monongahela National Bank, reported in 88 Pa. St., p. 157, where an attempt was made by Stephens to defend on the same note upon the same grounds raised by these specifications of error, and where it was held that "An accommodation maker of a note in regard to third persons is liable to pay it according to its tenor, and cannot successfully allege the paper was an imposition He is to be taken *pro veritate* as the drawer, and having placed himself in the position of principal he cannot escape by alleging that he was surety. The Payee having the loan of the maker's credit may sell or discount an antecedent note or pledge it as collateral security for a debt An indorser is something more than a surety, and is liable in the first instance as a drawer. Between makers and indorsers the relation of principal does not exist. Each prior party is a principal for each subsequent one.

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